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No. 12062

United States

Court of Appeals

for the Ninth Circuit

ROBERT H. GAULDEN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY and
PACIFIC FRUIT EXPRESS COMPANY,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

Typo Press, 398 Pacific, San Francisco 11-11-48—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California.

Attorneys for Defendants and Appellees.

In the District Court of the United States,
Northern District of California,
Southern Division

No. 27065-G

ROBERT H. GAULDEN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, PACIFIC FRUIT EXPRESS COMPANY, a Corporation and JOHN DOE COMPANY, a Corporation,

Defendants.

COMPLAINT FOR DAMAGES: PERSONAL INJURIES

FIRST CAUSE OF ACTION

Plaintiff complains of defendants and for first cause of action alleges:

I.

That at all times herein mentioned defendant, Southern Pacific Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business in the State of California and in other states; and that said corporation has its principal place of business in the State of California, in the City and County of San Francisco; that said defendant was at all times herein mentioned and now is engaged in the business of a common

carrier by railroad in interstate [1 *] commerce in the State of California and other states.

II.

That at all times herein mentioned defendant, Pacific Fruit Express Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Utah, and doing business in the State of California and other states; that said defendant, Pacific Fruit Express Company, was at all times herein mentioned, and now is, engaged in the business of a common carrier by railroad in interstate commerce in the State of California, as well as other states.

III.

That at all times herein mentioned defendant, Pacific Fruit Express Company, is and was owned by defendant, Southern Pacific Company and was acting in the furtherance of interstate commerce for defendant, Southern Pacific Company, in that at all times herein mentioned there existed between defendant, Southern Pacific Company, and defendant, Pacific Fruit Express Company, an agency contract dated and made effective July 1, 1942, providing that defendant, Pacific Fruit Express Company act as agent for defendant, Southern Pacific Company, in icing railroad cars used in interstate commerce for and on behalf of defendant, Southern Pacific Company; that at the time of the accident to plaintiff hereinafter mentioned, defendant, Pacific Fruit Express Company, was engaged in a

* Page numbering appearing at foot of page of original certified Transcript of Record.

joint enterprise with defendant, Southern Pacific Company, for their joint benefit and in the furtherance of interstate commerce by defendants, Southern Pacific Company and Pacific Fruit Express Company.

IV.

That at all times herein mentioned plaintiff was employed by defendant, Southern Pacific Company or defendant, Pacific Fruit Express Company, or both of said defendants, in such interstate commerce, and the injuries to plaintiff hereinafter [2] set forth arose in the course of and while plaintiff and said defendants, Southern Pacific Company and Pacific Fruit Express Company, were engaged in the conduct of such interstate commerce.

V.

That this cause of action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq.

VI.

That on or about the 7th day of June, 1946, at or about the hour of 5:30 a.m. thereof, plaintiff was employed by defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both of said defendants, as an iceman working in said defendants' yard at Bakersfield, County of Kern, State of California.

VII.

That at said time and place, in the regular course and scope of his employment by defendant, Pacific Fruit Express Company, or defendant, Southern Pacific Company, or both of said defendants, as

aforesaid, plaintiff, together with other employees of defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both of said defendants, was engaged in moving certain refrigerator cars used in interstate commerce by defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both of said defendants, in said yards; that in the course of said operation plaintiff was negligently and carelessly ordered by his foreman, who was then and there an employee of the defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company or both of said defendants, and who was acting in the course and scope of his employment, into an unsafe place of employment in that he was ordered to go behind a refrigerator car that had been unloaded in order to aid the momentum of said car by pushing the same while said car was [3] kicked by a loaded ice car to the rear of said empty car; that at said time and place plaintiff was negligently ordered by said foreman to push said empty car while said foreman negligently ordered other employees of defendants to set the rear loaded ice car in motion by use of a rope extending from a winch hooked on to the box car behind the empty car and said winch was then set in motion and the loaded car proceeded to move against the empty car which was being shoved by plaintiff. At said time and place and while plaintiff was pushing said empty car, pursuant to said order, a left front wheel of said loaded ice car ran over the right leg of plaintiff;

that as a proximate result of the carelessness and negligence of defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both defendants, as aforesaid, plaintiff received the following injuries:

Plaintiff's right leg was cut off and amputated eight inches below his right knee cap. Plaintiff alleges that said injury is permanent. Plaintiff has also suffered grievous shock and pain by reason of the aforesaid.

VIII.

That at the time of the happening of the aforesaid accident plaintiff was a strong and able bodied man, capable of earning, and in fact earning, the sum of One Hundred Eighty Dollars ($180.00) a month straight time, plus overtime in varying amounts as an iceman; that as a direct and proximate result of the negligence of the defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both defendants, as aforesaid, and the injuries proximately caused thereby, plaintiff has been unable to follow his usual occupation and in the future will be permanently disabled from following his usual occupation, all to his damage in the sum of One Hundred Fifty Thousand Dollars ($150,000.00). [4]

IX.

That in the necessary treatment of said injuries, plaintiff has incurred expenses for medical services and for the purchasing of an artificial leg, and prays leave of this Court to amend this complaint by incorporating herein the reasonable value of the

said services and articles when the same are ascertained.

X.

That by reason of the premises plaintiff has been damaged in the sum of One Hundred Fifty Thousand Dollars ($150,000.00).

Wherefore, plaintiff prays judgment against the defendant, Pacific Fruit Express Company or defendant, Southern Pacific Company, or both defendants, in the sum of One Hundred Fifty Thousand Dollars ($150,000.00), together with such special damages as may be hereafter ascertained and for his cost of suit herein and for such other relief as may be proper in the premises.

Dated March 14, 1947.

ROBERT H. GAULDEN.
RYAN & RYAN,

By DANIEL V. RYAN,
Attorneys for Plaintiff.

[Endorsed]: Filed April 1, 1947. [5]

[Title of District Court and Cause.]

ANSWER

Comes Now, Southern Pacific Company and Pacific Fruit Express Company, defendants above named, and each severally answering the complaint of the above named plaintiff on file herein, shows as follows:

I.

At all times mentioned in the complaint and herein, and in respect of the matters referred to in the complaint and herein, admits:

Defendant Southern Pacific Company was a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and qualified to do business, and doing business in the State of California, and other States, and was engaged, among other activities, in the business of a common carrier by railroad in interstate and interstate commerce in the State of California and other states. In the State of California said defendant has a principal place of business in the City and County of San [6] Francisco. Defendant Pacific Fruit Express Company was a corporation organized and existing under and by virtue of the laws of the State of Utah, and qualified to do business, and doing business, in the State of California, and other States. Defendant Southern Pacific Company was the owner of certain of the shares of the capital stock of defendant Pacific Fruit Express Company. Defendant Pacific Fruit Express Company was engaged in an independent business, in the course of which, among other activities, said defendant Pacific Fruit Express Company supplied refrigeration service and icing of cars and commodities at the instance of defendant Southern Pacific Company, and other railroads, under and pursuant to certain contracts between defendant Pacific Fruit Express Company and defendant Southern Pacific Company and other railroads.

One of said contracts, dated July 1, 1942, and in effect at said times, provided among other things, that defendant Pacific Fruit Express Company supply to defendant Southern Pacific Company refrigeration of certain commodities and icing of certain cars, said defendant Pacific Fruit Express Company to perform such services by and through its own employees. Said contract of July 1, 1942 also provided that defendant Pacific Fruit Express Company, in the course and conduct of its said independent business, perform said services as agent of defendant Southern Pacific Company, in the sense of agent of defendant Southern Pacific Company as distinguished from said defendant Pacific Fruit Express Company performing said services as the agent of the shippers or consignees of said commodities, or the customers of defendant Southern Pacific Company. Said services were in furtherance of the independent businesses of each of the defendants Southern Pacific Company and Pacific Fruit Express Company, to the extent, but only to the extent, that the supplying of any commodity or service by one engaged in one independent business to another engaged in another independent business is in furtherance of the independent business of each. [7]

On June 7, 1946, at about 5:30 a.m., plaintiff was employed by defendant Pacific Fruit Express Company as an iceman at the Ice Plant of said defendant at Bakersfield, County of Kern, California. At said time and place plaintiff was engaged in unloading ice from certain refrigerator cars. In

the course of said unloading, plaintiff assisted other employees of defendant Pacific Fruit Express Company in pushing a certain empty car, which had just been unloaded, so as to clear the unloading platform for the next car to be unloaded. The loaded car was being pulled up to the unloading platform by a cable and winch. At said time and place and while plaintiff was pushing said empty car as aforesaid, plaintiff fell and the wheels of the loaded car passed over his right foot which was later amputated by surgery.

II.

Defendants Southern Pacific Company and Pacific Fruit Express Company are, and each of them is, without knowledge or information sufficient to enable them, or either of them, to form a belief as to the truth of the allegations of the complaint in respect to the nature and extent of plaintiff's injuries, except as hereinabove admitted. Defendants Southern Pacific Company and Pacific Fruit Express Company, and each of them, denies each and every remaining allegation contained in the complaint not hereinabove admitted or denied, and denies that they, or either of them, or any of the officers, agents, servants, or employees of either of them was negligent in the premises, or in respect of any of the matters alleged in the complaint, and denies that any alleged negligence thereof was a cause, proximate or otherwise, of said accident, injuries or damages, if any, alleged by plaintiff.

And For a Second, Separate and Independent Answer and Defense to the complaint defendants each severally shows as follows: [8]

I.

Each defendant here repeats and alleges all of the matters and things set forth in Paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Plaintiff was negligent in those matters set forth in the complaint, and negligently conducted himself on and about said cars, and negligently performed his duties as an iceman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, proximately caused and contributed to the alleged accident, injuries and damages, if any, alleged by plaintiff.

And For a Third, Separate and Independent Answer and Defense to the complaint defendants each severally show as follows:

I.

Each defendant here repeats and alleges all of the matters and things set forth in Paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Plaintiff was negligent in those matters set forth in the complaint, and negligently conducted himself on and about said cars, and negligently performed his duties as an iceman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, was the sole cause, and the sole proximate cause of the alleged accident, injuries, and damages, if any, alleged by plaintiff.

And For a Fourth, Separate and Independent Answer and Defense to the complaint defendants each severally shows as follows:

I.

Each defendant here repeats and alleges all of the matters and things set forth in Paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. Plaintiff was employed by defendant Pacific Fruit Express Company in the State of California. At all times mentioned in the complaint and herein [9] defendant Pacific Fruit Express Company, in the State of California, had secured the payment of any compensation which might be payable by it to such of its employees injured in the State of California, and in the course of employment in said business, by being qualified as a self-insurer and by having secured from the Director of Industrial Relations of the State of California a certificate of consent to self-insure, which certificate was then and there in full force and effect.

II.

This Honorable Court has no jurisdiction of the subject-matter of the above entitled action, nor of the parties thereto, and the Industrial Accident Commission of the State of California has sole jurisdiction to determine any and all matters with respect to the accident and injuries referred to in the complaint.

And For a Fifth, Separate and Independent Answer and Defense to the complaint defendants each severally shows as follows:

I.

Each defendant here repeats and alleges all of

the matters and things set forth in Paragraph I of their fourth answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. After the accident referred to in the complaint, and after the receipt of such injuries as were received by plaintiff, defendant Pacific Fruit Express Company performed all acts and did all things required of an employer, with respect to an injured employee, injured in the course and scope of his employment, in the State of California, as required by the statutes of the State of California, and particularly the Labor Code of the State of California, and tendered to and provided for plaintiff all such medical, surgical, hospital treatment and nursing, supplies and other things and services as was or is reasonably required to cure and/or relieve from the effects of such injuries as plaintiff had received. In addition thereto, after the accident referred to in the complaint, defendant Pacific Fruit Express Company tendered to and paid, and [10] is now paying, to plaintiff, and plaintiff accepted and received, and is now receiving, from said defendant, all pursuant to the Labor Code of the State of California, compensation, and all compensation required to be paid and/or furnished by an employer to an employee injured within the State of California, as required by the statutes of the State of California.

II.

Each defendant here repeats and alleges all of the matters and things set forth in Paragraph II

of the fourth answer and defense above, and incorporates them herein by reference the same as though fully set forth at length.

Wherefore, defendants Southern Pacific Company and Pacific Fruit Express Company each prays that plaintiff take nothing by his complaint on file herein; that defendants each have judgment for its costs of suit incurred herein and for such other, further and different relief as, the premises considered, is proper.

Dated May 28, 1947.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,

Attorneys for Defendants Southern Pacific Company, and Pacific Fruit Express Company.

Receipt of a copy of the within answer is hereby admitted this 28th day of May, 1947.

RYAN & RYAN,

By DANIEL V. RYAN,

Attorney for Plaintiff.

[Endorsed]: Filed May 28, 1947. [11]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 30th day of June, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

ORDER GRANTING MOTION TO COMPEL REPLY TO DEFENSES

This case came on regularly this day to be set for trial and for hearing on motion to compel reply to defenses. On stipulation of Messrs. Mills and Blanchard, attorneys herein, it is Ordered that said motion be granted and that plaintiff be allowed ten days to make reply. Further Ordered that trial be set for October 9, 1947 (Jury). [17]

[Title of District Court and Cause.]

LIST OF AMOUNTS RECEIVED BY PLAINTIFF TO DATE FROM PACIFIC FRUIT EXPRESS COMPANY UNDER THE CALIFORNIA STATE INDUSTRIAL ACCIDENT COMMISSION.

On June 30, 1947 defendants herein argued their motion to compel plaintiff to reply to defendants' fourth and fifth defense in their answer. The above-entitled Court granted said motion only in the following respect. It required plaintiff only to state what amount he has received to date under the provisions of the California State Industrial Accident Commission.

Plaintiff has received from the Pacific Fruit Express Company to date, under the mistaken impression of Pacific Fruit Express Company that the Labor Code of the State of California has jurisdiction herein, the following sums: [18]

6-21-46	$ 4.29
7-10-46	64.29
7-17-46	64.29
9-6-46	68.57
9-6-46	64.29
9-10-46	68.57
9-20-46	64.29
10-10-46	64.29
10-24-46	64.29
11-7-46	68.57
11-21-46	64.29

12-4-46	64.29
12-23-46	64.29
2-3-47	68.57
2-6-47	64.29
2-6-47	68.57
2-27-47	64.29
3-11-47	55.71
3-24-47	64.29
4-8-47	68.57
4-30-47	64.29
5-15-47	64.29
5-28-47	64.29
6-11-47	68.57
Total amount received	$1504.34

Pursuant to the order of the above-entitled Court made on June 30, 1947 requiring plaintiff merely to list the sums he has received to date, plaintiff does not hereby answer paragraphs four or five other than in said respect.

Dated July 2, 1947.

RYAN & RYAN,

By /s/ DANIEL V. RYAN,
Attorneys for Plaintiff.

[Endorsed]: Filed July 9, 1947. [19]

[Title of District Court and Cause.]

ADDITIONAL INTERROGATORIES TO DEFENDANTS

To defendants above named, and each of them, and to Messrs. Dunne & Dunne, their attorneys:

You, and each of you, are hereby required, by any officer or agent, to answer in writing the following interrogatories within fifteen (15) days after delivery to you of said interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure. Each of the following interrogatories shall apply to each of the defendants and shall be answered separately and fully in writing under oath, and signed by the person or persons making them.

1. Is it not a fact that the Pacific Fruit Express Company icing yard at Bakersfield, California is leased to it by Southern Pacific Company or Southern Pacific Railroad Company?

2. What percentage of iced refrigerator cars on leaving the Pacific Fruit Express Company icing yard at Bakersfield make the initial movement by rail on the tracks of the Southern Pacific Company?

3. What percentage of iced refrigerator cars on leaving the Pacific Fruit Express Company icing yard at Bakersfield make the initial movement by engines under the control and management of the Southern Pacific Company?

4. Is it not a fact that the icing service rendered by the Pacific Fruit Express Company under its Protective Service Contract of July 1, 1942 be-

tween it and Southern Pacific Company and Union Pacific Railroad Company applies only to the Southern Pacific Company in regard to the servicing under said contract by the Pacific Fruit Express Company at its icing yard at Bakersfield, California on June 7, 1946 at the time of the accident to plaintiff herein? [29]

Dated October 7, 1947.

RYAN & RYAN,

By DANIEL V. RYAN,

Receipt of Service of the within Additional Interrogatories to Defendants is hereby admitted this 7th day of October, 1947.

DUNNE & DUNNE. [30]

[Endorsed]: Filed Oct. 8, 1947.

[Title of District Court and Cause.]

STIPULATION AND ORDER

The parties to the above entitled action, by their respective attorneys, hereby stipulate as follows:

1. Upon the making and filing of this stipulation the Court may make its Order approving the same.

2. Heretofore the plaintiff served upon defendants certain interrogatories, objections were made

to certain of said interrogatories and certain proceedings were had thereon and on pre-trial conference. Attached hereto are two verified narrative statements, one verified by an officer of Pacific Fruit Express Company and one verified by an officer of Southern Pacific Company. Said narrative statements, together with this stipulation, shall be deemed answers by the defendants to the interrogatories heretofore [31] served and filed by plaintiff, shall be deemed a sufficient answer to said interrogatories and satisfy the obligation of defendants to make answer to interrogatories and without regard to the manner of verification of the attached narrative statements, said statements and this stipulation shall stand as answers to the said interrogatories, as aforesaid, without regard to whether said interrogatories were directed to one or the other of said defendants or to both of said defendants.

3. Certain interrogatories were directed to defendants as to aspects of their respective businesses and the nature of the work of the plaintiff herein. These interrogatories need not be answered in view of the following:

In respect of the issue of applicability of the Federal Employers' Liability Act and whether this action can be maintained under that Act, the parties hereto agree: Plaintiff received a salary from the Pacific Fruit Express Company.

Plaintiff contends that he is an employee under the terms of the Federal Employees' Liability Act of both the defendants, Pacific Fruit Express Com-

pany and the Southern Pacific Company, by virtue of an agency contract (the contract here referred to by plaintiff is the contract attached hereto as more fully appears below) between the Pacific Fruit Express Company and the Southern Pacific Company under the theory that the Pacific Fruit Express Company was acting as agent of the Southern Pacific Company in the icing and moving of cars, being done at the time of plaintiff's injury and because of the measure of control and other indicia creating a relationship of master and servant between the Southern Pacific Company, as master, and the Pacific Fruit Express Company, as servant.

Defendants do not concede but to the contrary deny and resist plaintiff's position, claim and theory. The contract [32] referred to is attached hereto (by attachment to the attached "Narrative Statement Submitted by Pacific Fruit Express Company") for perusal by the Court. If the Federal Employers' Liability Act applied to Pacific Fruit Express Company at the time plaintiff was injured and if Pacific Fruit Express Company was an employer within that Act, then plaintiff was such an employee of Pacific Fruit Express Company, and plaintiff's work and duties were of such nature, that he was an employee of Pacific Fruit Express Company within the meaning of that Act and was an employee of Pacific Fruit Express Company to whom that Act applied, that is to say, if otherwise the Federal Employers' Liability Act applied to Pacific Fruit Express Company, then

the Pacific Fruit Express Company and plaintiff were engaged in interstate commerce within the meaning of that Act. In this regard the issue is whether by virtue of the said attached contract the Federal Employers' Liability Act applied to Pacific Fruit Express Company and whether it was a common carrier by railroad and defendants, and each of them, reserve this question and as to this no stipulation is made and this is in issue. If the Federal Employers' Liability Act applied to Pacific Fruit Express Company and it was a common carrier by railroad within the meaning of the Federal Employers' Liability Act this section is properly brought under that Act and the other issues tendered by the complaint are open for decision but if Pacific Fruit Express Company was not such a common carrier by railroad this action is not properly brought.

4. The issue of application of the Federal Employers' Liability Act (that is the issue referred to and reserved in paragraph 3 hereof) shall be submitted to the Court for decision on pre-trial conference, on the pleadings, this stipulation and the attached statements of fact (subject to the reservation of [33] objections as stated in paragraph 5 below) for disposition by the Court. If the Court determines that the Act does apply then the cause shall be set down for trial and tried on the issues made by the pleadings and if the Court determines that the Act does not apply it may make appropriate order and judgment disposing of the case, plaintiff reserving objection and excep-

tion if the Court holds that the Act does not apply and judgment, accordingly, is entered for defendants, and defendants, and each of them, reserving objection and exception if the Court holds that the Act does apply.

5. Each of the parties hereto makes and reserves to each matter of fact stipulated to and to each matter stated in the attached narrative statements the objection that the same is irrelevant, immaterial and is not within any issues of the case, and is not preliminary to or foundation for any matter which is competent, relevant or material or within any issue of the case. In this regard the reservation of objection is to the substance of the matter stated but it is agreed that there is no objection to the foundation or form of the showing and that if otherwise the matter is competent, relevant and material it is deemed that the same has been proved by appropriate documentary evidence or a witness competent and qualified to testify.

RYAN & RYAN,

By /s/ DANIEL V. RYAN,
Attorneys for Plaintiff.

/s/ A. B. DUNNE,

/s/ DUNNE & DUNNE,
Attorneys for Defendants. [34]

ORDER

Good cause appearing therefore, the foregoing stipulation is approved and made a part of this

order and this order shall stand as an order in respect of issues and showing on pre-trial conference and the issue submitted to the Court for decision on pre-trial conferences shall stand submitted on memoranda as heretofore ordered by the Court.

Done in Open Court, this 10th day of November, 1947.

/s/ LOUIS E. GOODMAN,
Judge, U. S. District Court. [35]

[Title of District Court and Cause.]

NARRATIVE STATEMENT SUBMITTED BY SOUTHERN PACIFIC COMPANY

1. The statements herein made, unless otherwise restricted, are made as of all times pertinent in the above entitled action. Pacific Fruit Express Company, a Utah corporation, defendant in the above entitled action, is herein referred to as PFE. SP as herein used refers to Southern Pacific Company and at all times prior to September 30, 1947, refers to the Kentucky corporation by that name and as of all times on and after September 30, 1947 refers to the Delaware corporation by that name, successor to the Kentucky corporation. UP as herein used refers to Union Pacific Railroad Company, a corporation.

2. SP and UP each was, as to some of its business and activities, a common carrier by railroad engaged in interstate [36] commerce and subject

to the Interstate Commerce Act, its amendments, Acts supplementary thereto and Federal Statutes in pari materia therewith and in pari materia with the Federal Employers' Liability Act, and each, as such common carrier by railroad, was subject to the jurisdiction of the Interstate Commerce Commission. SP and UP had no common officers or directors. SP owned none of the capital stock of UP. UP was not the owner or holder of record of any of the capital stock of SP. If UP had any beneficial interest in any of the capital stock of SP standing of record in any other name the amount of such stock was less than 4,000 shares and less than 1/10 of 1% of the issued and outstanding capital stock of SP.

3. Before the commencement of business by PFE, SP and UP were common carriers by railroad. Before PFE commenced business refrigerator car service, "protective service" and service to users of railroads of the sort for which the facilities and services of PFE were used after commencement of business by it, were made available by SP and UP to railroad users by being furnished by third persons acting under contracts between such third persons and SP and UP and neither before nor after the commencement of business by PFE did SP or UP undertake to provide, or provide, any such service or facilities except by and through such third persons and/or PFE. The facilities and services so provided by such third persons before the commencement of business by PFE were essentially those furnished by PFE after its

organization and after it began business and hereinafter more particularly described.

4. The ice being handled by plaintiff and his fellow employees of PFE at Bakersfield, California, on or about June 7, 1946, was transported and hauled to the yard at Bakersfield, California, by an engine operated by SP. [37]

5. No employees of SP were employed or worked at the PFE icing dock, or installations, or plant, or property at Bakersfield, California, except enginemen and switchmen, members of SP yard switching crews, who were full time SP employees and members of SP yard or switching crews switching cars in or out of tracks at said PFE plant, and elsewhere, in and about Bakersfield, California, in the normal course of common carrier railroad service of SP or in the course of a switching move of refrigerator cars or other cars used in the railroad "protective service" of Atchison, Topeka & Santa Fe Railway Company or Sunset Railway, common carriers by railroad. There were no employees of SP at Bakersfield, California, engaged in the business of PFE or performing any of its services or acting as its agent.

6. Hospitalization and medical treatment for injured employees of PFE injured at Bakersfield and other places in California, and elsewhere, was available in the following way and the following circumstances:

(a) There had been established hospital plans, respectively, for employees of SP and UP. The SP plan was one of medical and hospital treatment

and service for SP employees (and others as herein stated). Said plan was managed and operated by a Board of thirteen members, seven of whom were selected by employee participants in the plan and six of whom were appointed by SP. Under said plan there was operated a general hospital and medical, dental and nursing treatment, attention and service was provided. The operations of said plan were conducted with segregated funds and without any liability on the part of SP for any deficit in the operation of the plan or to make any payments for any treatment, attention or service except as it made payment for services rendered in the case of on-duty injuries to SP employees, or to others [38] to whom it was legally obligated to provide such treatment, attention or service.

(b) Both the SP plan and the UP plan were available to employees of PFE as employee participants. Employees of PFE were participants in one or the other of said plans, in the SP plan or the UP plan, depending upon whether the employee of PFE worked on or near the line of SP or on or near the line of UP. This was under arrangement between PFE and the operators of said plans.

(c) The said arrangements between PFE and the operators of said plans were that all employees of PFE who were eligible for either of said plans were required to be an employee participant in one or the other of said plans depending on the place of employment of said PFE employee, as above stated. In the case of PFE employees, contribution from eligible employees to the appropri-

ate plan was compulsory and was made by deduction by PFE from the employee's salary check. Plaintiff was such an employee of PFE and on account of his eligibility for and participation in the SP plan, $2.75 per month was deducted by PFE from his pay.

(d) Under the SP plan participants in the plan (Plaintiff included) were entitled to medical, dental, nursing, hospital and similar attention and service required for any illness or disease (mental illness and venereal diseases excepted) and injuries (whether received on duty or off duty) but in the case of PFE employees (the plaintiff included) their contributions were used only for illness, or for injury not connected with the performance of duty as a PFE employee and in the case of all injuries to PFE employees arising out of and in the course of their employment PFE paid to the SP plan the actual cost of care and treatment furnished where PFE was legally liable for such care and treatment.

H. J. WALKER.

A. B. DUNNE,

DUNNE & DUNNE,

Attorneys for Defendant Southern Pacific Company. [39]

State of California,
City and County of San Francisco—ss.

H. J. Walker, being first duly sworn, deposes and says:

I am an Officer, to-wit, the Executive-Assistant, of Southern Pacific Company, a defendant in the above entitled action, and as such make this affidavit and verification. For the purpose of making this verification and affidavit I have examined the records of Southern Pacific Company, reports and orders of the Interstate Commerce Commission and in respect of other matters where I have no personal knowledge I made inquiry of persons believed by me to know the facts and this affidavit and verification is made by me based on the information so acquired. I have read the foregoing statement on behalf of Southern Pacific Company and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

H. J. WALKER.

Subscribed and sworn to before me this 7th day of November, 1947.

(Seal) KATHRYN E. STONE,
Notary Public in and for the City and County of San Francisco, State of California.

[40]

[Title of District Court and Cause.]

NARRATIVE STATEMENT SUBMITTED BY PACIFIC FRUIT EXPRESS COMPANY

I.

1. The statements herein made, unless otherwise restricted, are made as of all times pertinent in the above entitled action. Pacific Fruit Express Company, a Utah corporation, defendant in the above entitled action, is herein referred to as PFE. SP as herein used refers to Southern Pacific Company and at all times prior to September 30, 1947, refers to the Kentucky corporation by that name and as of all times on and after September 30, 1947, refers to the Delaware corporation by that name, successor to the Kentucky corporation. UP as herein used refers to Union Pacific Railroad Company, a corporation.

2. The statements of paragraphs 5 and 6 of the narrative statement submitted by Southern Pacific Company are adopted. [41]

3. PFE was and is a Utah corporation organized in 1906. It qualified to do business in California December 6, 1906, began the doing of its business in California October 1, 1907, and ever since has been duly licensed to do business and doing business in California.

The business conducted by PFE since the commencement of business by it was substantially its business hereinafter described.

4. PFE, prior to the commencement of business by it, acquired some of the facilities required for

that business and used in that business, as herein described, from persons who theretofore had provided such service to SP and UP and among the facilities so acquired were icing plants and car building and repair shops. Theretofore and thereafter it acquired other facilities from other sources. PFE did not acquire any of its properties or facilities from SP or UP except as by purchase or lease it acquired real property for ice plants or car shops near the lines of either of said railroads or, under contract, had one or the other of said railroads do track or other construction work for it.

5. After PFE began the commencement of business SP and UP obtained services and facilities of the sort provided by PFE primarily from PFE, under contract with it, except that, as hereinafter more fully appears, both of said railroads availed themselves of empty refrigerator cars which might be on their respective lines from time to time for loading and carrying perishables and other commodities properly moving in such type of cars, without regard to who owned said cars and many of said cars were not PFE cars.

6. At the time PFE was organized its authorized stock was $100 par value common stock and all of said stock issued was issued to, and fully paid for by, UP and SP in equal proportions [42] and ever since, and at all times herein mentioned, UP has owned one-half of the issued and outstanding capital stock of PFE and SP has owned the other one-half of the issued and outstanding capital stock of PFE and all of said issued stock was fully paid up.

7. On June 7, 1946, the date of the accident herein involved, there was issued and outstanding 240,000 shares of the common capital stock of PFE, each share being of a par value of $100, and of said 240,000 shares SP owned 120,000 shares and UP owned 120,000 shares.

8. In June 1946, the following were officers and directors of PFE elected as directors by vote of the stockholders of PFE and had railroad connections as hereinafter indicated, to-wit:

R. E. Plummer, President and a Director of PFE, was Controller of SP at New York.

E. B. Conrad, Vice President and a Director of PFE, was UP Assistant Controller at New York.

E. M. Kindler, a Director of PFE, was elected by vote of UP stock and is believed to have some connection with UP, the exact nature of the connection being unknown to the officer verifying this statement.

Darwin P. Kingsley, a Director of PFE, was elected by vote of UP stock and is believed to have some connection with UP, the exact nature of the connection being unknown to the officer verifying this statement.

Charles L. Minor, a Director of PFE, was one of the General Attorneys of SP located in New York.

John B. Reid, a Director of PFE, was Assistant to SP Vice President in Charge of Finance in New York.

9. In addition to the foregoing Officers and Directors, in June, 1946, PFE had the following prin-

cipal officers who had no railroad connection nor any connection with UP or SP and who devoted their full time in the business of PFE: [43]

K. V. Plummer, Vice President and General Manager and principal operating officer of PFE in charge of all actual business and operations of PFE.

C. Ahern and O. I. Larsen, Assistant General Managers, in charge of allocation and assignment of cars to railroads.

Walter H. Rogers, Auditor in charge of Finance and Accounts.

L. E. Cartmill, General Superintendent of Car engineering, construction and maintenance, in charge of the car shops and repair shops.

L. Etzel, General Superintendent of Refrigeration, San Francisco, in charge of all ice plants, and icing and protective service at ice plants.

Fred Garrigues, Personnel Manager.

10. The PFE business and operations, hereinafter more particularly referred to, conducted and carried on by it were conducted, directed, managed and carried on for it by (a) its executive officials and (b) its employees as follows: General foreman, shop foremen, carpenters, carmen, carmen helpers, mechanics, mechanic's helpers, machinists, car laborers, car painters, derrick operators, welders, store clerks, store deliverymen, store laborers, icemen (including plaintiff), ice-pullers, and other men employed in ice manufacturing plants, ice plant managers, icing dock foremen, inspectors and the like. Said employees were all full time employees of

PFE and none of them were joint employees of PFE and any other firm, person or corporation. Most (if not all) employees in class (b) above belonged to labor unions (sometimes referred to as Brotherhoods) and PFE had collective bargaining agreements with said unions as the collective bargaining agents of such employees and as to the employees of PFE said collective bargaining contracts were solely between PFE on the one hand and such collective bargaining agent on the other hand and in respect of PFE business and employees. Said employees [44] in class (b) did their work under the control, supervision and direction of PFE officers and supervisory employees. None of said employees of PFE were employed under or governed by any collective bargaining agreement or contract to which any railroad or SP or UP was a party. Seniority of the employees of PFE was solely by reason of employment by PFE, prior or later employment of such employee by any railroad or SP or UP had no relation to any seniority with PFE and there was no cross seniority between employees of PFE and employees of any railroad or SP or UP.

II.

1. (a) PFE was one of a number of corporations in the United States engaged in the same line of business. This business was that hereinafter described, by description of the business of PFE, conducted as hereinafter described. Among such other corporations were American Refrigerator Transit Company, Burlington Refrigerator Express Com-

pany, Western Fruit Express Company, Fruit Growers Express Company, and Merchants Dispatch, Inc. All of said corporations are hereinafter sometimes referred to as car companies.

(b) Many common carriers by railroad in the United States provided common carrier by railroad service for the transportation of commodities (usually referred to as "perishables") which were subject to being adversely affected by heat or by cold or by changes in temperature or by natural deterioration unless kept cold, and in connection with such transportation undertook to make available to those interested in the transportation of such perishables a service to protect such perishables against such adverse effect or natural deterioration by making available "protective service" SP and UP were among such common carriers by railroad. Said protective service was made available by making [45] available specially designed and built cars of various types and making available servicing of said cars so as to regulate the temperature of the interior of said cars. The most common type of said car was the standard refrigerator car and for that reason all of said specially designed and built cars are commonly referred to and are all herein referred to, as reefers. After April 15, 1946, such protective service was furnished by more than four hundred common carriers by railroad in the United States (including SP and UP) under the provisions of "Perishable Protective Tariff No. 14" and the supplements thereto (Interstate Commerce Commission No. 25 and

California Public Utilities Commission No. 16) in which said common carriers by railroad (SP and UP included) were participating carriers. Said tariff and its appropriate supplements were duly posted, published and filed, agreeably to the laws of the United States and of the State of California in such cases made and provided and were in force and effect at all times after April 15, 1946. Said tariff specified the various types of protective service available and the method by which shippers could avail themselves of such service. In and by said tariff, it was expressly provided that the carriers, participating in said tariff reserve the right to furnish reefers necessary for the services specified in said tariff "through their own ownership or by arrangement with non-shipper private car lines" or "by arrangement through the Association of American Railroads with shipper-owned car lines or shipper car-owners".

(c) Many common carriers by railroad in the United States and many of such carriers parties to said Perishable Protective Tariff No. 14 and its supplements, including SP and UP, providing reefer service and protective service owned no reefers and obtained and provided the same for common carrier railroad service and [46] obtained and provided protective service and the servicing of reefers by arrangement with various car companies in substantially the manner hereinafter described as to PFE.

2. The business and activity conducted by PFE by and through its employees as above stated in paragraph 10 of Part I was as follows:

(a) "Car hire" business, i. e., owning and maintaining reefers and furnishing them to railroads for use in the railroad service as hereinafter stated.

(b) Owning and operating car shops and plants for the maintenance, repair and rebuilding of reefers and heater equipment, as hereinafter stated.

(c) Owning and operating ice plants for the manufacture of ice and manufacturing ice.

(d) Servicing reefers in use by common carriers by railroad by providing to common carriers by railroad "protective [47] service" i. e., heater service and ice and icing and refrigerator service, as hereinafter stated. The heater service was only a small proportion of the business of PFE, the large part of its protective service being icing.

(e) The PFE business and activities herein described were conducted and directed by its employees as stated in paragraph 10 of Part I above, its income was payments received (1) from common carriers by railroad for car hire of cars, (2) from common carriers by railroad for protective service (see below) and (3) from car companies for repair of cars of other car companies. As of June 1946 the net worth of PFE was more than $40,000,000. From its own funds, PFE paid all operating expenses including wages of employees, cost of cars purchased, cost of supplies and materials, cost of plants, cost of power and public utility services, insurance, taxes and, where property was leased by it from other persons (railroads included), rent.

3. PFE conducted its "car hire" business in all

parts of the United States and on the lines of all railroads in the United States parties to said Perishable Protective Tariff No. 14 as hereinafter more fully appears. PFE conducted its other business in the States of Oregon, Washington, California, Idaho, Utah, Nevada, Arizona, Texas, Louisiana, Colorado, Kansas, Wyoming, Nebraska and Iowa. Its car shops were located at Nampa, Idaho; Roseville, California; Los Angeles, California; Colton, California; Pocatello, Idaho and Tucson, Arizona.

4. The PFE "car hire" business carried on and conducted by it was conducted by it as follows:

(a) PFE acquired, owned, maintained and furnished reefers to common carriers by railroad for use in railroad [48] service. As of June 1946 the number of such reefers was more than 35,000. It did not move, or control the handling of, the reefers so furnished and did not in any way move any of its reefers or any other reefers except as it moved reefers that were out of service and in its shops for repair or rebuilding, about the shops and except as by the use of non-locomotive power its employees moved reefers at icing docks or loading platforms for the purpose of facilitating its own work of handling ice and providing protective service by servicing reefers. The reefers so furnished whether loaded or empty were freely interchanged between all railroads referred to in paragraph 3 of this Part II and moved over the lines of all said railroads.

(b) On account of furnishing reefers, as afore-

said and except as stated below, PFE received $.02* per car for each mile that each standard reefer moved (loaded or empty) over the line of any railroad (SP and UP included), said amount being paid to PFE by each railroad over whose line the car moved on the basis of $.02* for each mile moved (loaded or empty) on the line of such railroad. This sum was paid for car hire and did not cover any protective service. For example, said car hire was paid as follows: If a standard PFE reefer moved under revenue load (either with or without protective service) from San Francisco, California to Boston, Massachusetts by SP, UP, C&NW, NYC, and B&A (each group of initials representing a separate common carrier by railroad), each of said five railroads paid to PFE $.02* for each mile said reefer moved over the line of that railroad and if said car, after unloading at Boston, Massachusetts, was then returned empty to Los Angeles, California, via NY NH&H, Penn R. Co., and AT&SF (each group of initials representing a separate common carrier by railroad) the last [49] three named railroads paid PFE $.02* per mile for each mile said reefer mover over the line of that railroad, although none of said three last mentioned carriers hauled said reefer in revenue service. Likewise SP and UP respectively paid the owning car company (whether it was PFE or any other car company) $.02* for each mile each

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* Prior to July 1, 1946. On and after July 1, 1946 $.025 per mile.

standard reefer owned by such company moved, loaded or empty, over the line of SP or UP respectively. This system of paying car hire for reefers on a mileage basis was uniform throughout the United States, applied to all car companies (PFE included) and all common carriers by railroad. The car hire, as aforesaid, was paid to the respective car companies by the said common carriers by railroad respectively and no part of it was paid by any shipper or other customer of any common carrier by railroad or other person liable for railroad services furnished, and, to the contrary, the only charge paid by the shipper or other customer of common carriers by railroad or other person liable for railroad services furnished, for use of reefers was unsegregated and included in the line haul tariff charge of the respective common carriers by railroad.

(c) There were the following minor exceptions to the matter stated in sub-paragraph (b) just above: On a comparatively small number of special type cars the rate per mile was different but was otherwise paid and applied as stated in said paragraph and on a mileage basis, but this exception applied only to certain car companies other than PFE and in the case of PFE all of its car hire was applied and paid as above stated. Also, some car companies (PFE not included) for a certain comparatively small number of special cars for special use had a minimum monthly guarantee arrangement. There was a further unimportant exception in that a few reefers were rented by car

companies to [50] railroads or shippers on a monthly basis. The exceptions stated in this sub-paragraph (c) were minor and special exceptions, unimportant in the general conduct of the business of the car companies, insufficient to change its general character, as herein and elsewhere stated and stated here only for the sake of accuracy.

(d) In actual practice all common carriers by railroad upon whose lines there was any empty PFE reefer could, and did, load and use such reefer as originating carriers and in their own common carrier by railroad service and so used empty reefers on their respective lines without regard to the car company which was the owner thereof, and as the business and convenience dictated. This practice was followed by SP and UP and in their own services as common carriers by railroad they loaded and used any empty reefer on their respective lines in their service and as originating carriers and so used the reefers of all car companies in the same manner they used PFE reefers.

(e) PFE owned no cars other than reefers and owned no rail motive power except one plant locomotive used at its Roseville car shop for shop switching purposes and for no other purpose. PFE neither owned nor operated any railroad tracks except (1) shop tracks used by it exclusively in the operation of car shops and (2) plant unloading tracks at icing docks and icing plants where the unloading track was its track held by it as owner or under lease and used only for delivery to PFE

of ice which was brought to such plant or dock for use in PFE icing service.

(f) PFE did no railroading and performed no railroad operations (except as its business herein described may have been railroading or railroad operations), movement of reefers to and [51] from its icing plants and icing docks was by switching moves and such switching moves were always performed by some common carrier by railroad, usually SP or UP.

5. The PFE business of conducting and operating car repair and rebuilding shops was conducted by it as follows:

(a) PFE owned all the shop facilities including buildings and tracks and was owner of the land utilized for the same, or held such land under lease on which it paid rent and taxes, and in said shops conducted the business of maintaining, repairing and rebuilding (and in rare instances building new) reefers by use of its own forces, materials, etc., and at its own expense.

(b) In said shops PFE rebuilt and repaired its own reefers.

(c) In said shops PFE repaired reefers of other car companies when the same required repair and the reefer requiring repair was on the lines of SP, UP, Western Pacific Railroad Company or any railroad so located that a PFE shop could be reached over the line of such railroad and without making use of the services of any other railroad (except switching service in some instances) and said repairs were paid for by the owner of the reefer.

6. The PFE business of operating ice plants and manufacturing ice was conducted by it as follows:

(a) The ice plants were located near the facilities of common carriers by railroad, the ice manufactured by PFE was manufactured by the usual and customary methods and such ice was normally not sold commercially but was used in the PFE icing service or furnished to the SP or UP for railroad purposes.

(b) In certain instances it was necessary for PFE [52] to buy ice commercially from commercial manufacturers of ice (1) in certain instances where its own ice making facilities did not have sufficient capacities to meet periodic demands made upon it in carrying on its icing service business and (2) in some instances PFE had icing docks located at points where it had no ice manufacturing plant and it was necessary for it, at such points, as at Phoenix, Arizona; Brawley and El Centro, California, to buy ice from commercial manufacturers or, in some instances, where it had a surplus at other points, to bring in such ice.

7. The PFE business of providing "protective service" consisted of providing services of three general sorts (1) heater service, (2) ventilator service and (3) refrigeration service, i. e., supplying ice and (3) refrigeration service, i. e., supplying conducted by it was conducted as follows:

(a) The service was furnished to common carriers by railroad (SP and UP included) which reached PFE plants by their own lines (including

railroads which could reach said plants by their own lines with no service from any other railroad except switching service). For example, such service was furnished to Atchison, Topeka & Santa Fe Railway Company at Bakersfield, California. The lines of said railroad went into Bakersfield and the PFE icing docks at Bakersfield were reached by Atchison, Topeka & Santa Fe Railway Company by use of its own lines and switching service of SP at Bakersfield. So protective service was furnished to Western Pacific Railroad Company at Carlin, Nevada and Modesto, California and for various railroads at Salt Lake City, Utah and other railroads throughout the area in which PFE did business as hereinabove stated.

(b) Such protective service was provided by PFE for all [53] reefers, whether PFE reefers or reefers of other car companies, so long as the same were presented for servicing by a common carrier by railroad.

(c) SP and UP made available to users of their railroad facilities and service all of the types of protective service specified in Perishable Protective Tariff No. 14 and its supplements. Among the services so provided were the following:

(1) Standard refrigeration;

(2) Half-stage refrigeration;

(3) Top or body icing (that is, ice placed in the body of the car as distinguished from the bunkers of the car);

(4) Shipper's protective service (initial icing or heat provided by shipper);

(5) Shipper's specified service (protection against frost, freezing or artificial overheating supplied by use of heaters furnished, installed, and serviced by carriers, or for carriers, as directed by shipper);

(7) Carrier's protective service;

(8) Ventilation service (various types);

(9) Protective service against cold.

Under said tariff the shipper was required to specify to the carrier, in writing, the character of the service desired by the shipper. In addition, the shipper by direction in writing to the carrier, had the privilege, under the tariff, of changing the character of service. In addition, under the tariff, the shipper was entitled to specify in writing to the carrier the character of icing desired, whether crushed, coarse or chunk ice, was entitled to specify to the carrier in writing that the car be pre-cooled or pre-iced, in the case of icing was entitled to specify to the carrier in writing the amount of salt, if any, to be used, was entitled to give instructions to the carrier as to re-icing [54] and was entitled to give to the carrier instructions as to the character of ventilation service desired where it was desired. In short there were various types of protective service available under the tariff. the type of service once specified by the shipper could be changed by the shipper, and within each type of service there were variations which the shipper could specify. The shipper was required to give to the carriers orders in writing as to the character of service desired within the various characters of

service permissible under the tariff and the variations of each. In the case of SP and UP, (where the protective service made available by them under the tariff was furnished by PFE), SP or UP, on receipt of the shipper's orders as to the character of service desired, transmitted these by orders to PFE and PFE then complied with said orders and furnished the character of service ordered. In the performance of protective service no other orders were given by SP or UP to PFE except such orders, such orders were only as to the character of service ordered by the shipper, such orders were only as to the result to be furnished to the shipper and neither SP nor UP gave PFE orders as to how PFE should accomplish the result of providing the type of service ordered by the shipper. The same procedure was followed by SP and UP where shipment originated on the lines of SP or UP and while the shipment was in course of transit the shipper gave to SP or UP an order to change the character of protective service. If the reefer was then no longer on the lines of SP or UP a shipper's order given to SP or UP as originating carrier, was transmitted by it to the railroad or the car company or such other person as would perform the service and follow the shipper's instructions and change the character of service and was transmitted in the same way as hereinabove stated in the case of orders [55] transmitted to PFE. In this regard there was no distinction between the orders for performance of protective service given by SP to PFE in respect of cars on

SP lines and orders given by SP to other railroads, car companies or other third persons in respect of cars originating on SP lines but off SP lines at the time the order was given.

(d) PFE was paid for the protective service provided by it by the common carrier by railroad to whom the service was furnished. In the case of SP and UP it was paid as provided in the contract referred to in sub-paragraph (e) below, copy of which is hereto attached. PFE was not paid anything by any shipper or other person availing himself of reefer or protective service on the line of any common carrier by railroad. To the contrary, such service was paid for by such shipper or such other person, by making payment to the common carrier by railroad at the tariff rates provided in Perishable Protective Tariff No. 14 and its supplements and said payment was made to the railroad presenting the freight bill for line haul service, or by other appropriate common carrier by railroad party to the line haul.

(e) The contract, a copy of which is hereto attached, was the only contract in respect of protective service between PFE and SP and UP. It was approved by the Interstate Commerce Commission, became effective July 22, 1942, and has ever since been in effect. PFE had substantially similar contracts with other railroads.

8. PFE was not party to any railroad or common carrier by railroad or other tariff nor did it have any posted, published or filed tariff with the Interstate Commerce Commission or the Public

Utilities Commission of the State of California or similar body in any State or any other such tariff and made no tariff [56] or other charge to any shipper or other user of facilities of common carriers by railroad and had no business revenue except as hereinabove stated. PFE did not issue any bills of lading or other shipping documents or enter into any other form of agreement with any shipper or other person availing himself of the services of common carriers by railroad. All claims for loss or damage to shipments moving in reefers and/or protective service over the lines of any common carrier by railroad were made to the appropriate common carrier by railroad, handled by such carrier, in proper cases paid by such carrier and no charge on account thereof was passed to PFE directly or indirectly and PFE never assumed any responsibility for or recognized any such claims either to common carriers by railroad, or shippers or other persons, except as responsibility to common carriers by railroad for PFE's own defaults were recognized and except as provided in paragraphs 12 and 13 of the contract, a copy of which is hereto attached, in the case of SP and UP and the common carriers by railroad specified in Appendix A to that contract.

9. The method hereinbefore described of providing reefer service and railroad protective service has been used in the United States for many years and for many years long prior to 1939 and while PFE was conducting its business as aforesaid and the principal car companies providing such service

and operating as PFE operated as herein set out, other than PFE, were:

American Refrigerator Transit Company, whose stock was wholly owned by Missouri Pacific Railroad Company and Wabash Railroad Company;

Burlington Refrigerator Express Company, whose stock was wholly owned by Chicago, Burlington & Quincy Railroad Company;

Western Fruit Express Company, whose stock was wholly owned by Great Northern Railway Company; [57]

Merchants Dispatch, Inc., whose stock was wholly owned (indirectly) by New York Central Railroad Company;

Fruit Growers Express Company, whose stock was owned by nineteen common carriers by railroad;

and said stock owning railroad companies were all major common carriers by railroad engaged in interstate commerce in the United States. During all of said time said facts were well known to the Interstate Commerce Commission and matters of general notoriety in the United States.

10. During all the time herein mentioned PFE has consistently taken and adhered to the position (and now does so) that it was not a common carrier by railroad, was not subject to the Federal Employers' Liability Act and that its employees were not under the Federal Employers' Liability Act and, to the contrary, has consistently taken the position, and acted on the position, in which its employees have acquiesced, that its employees in-

jured in the State of California were all subject to the Workmen's Compensation Act of the State of California (now embodied in the Labor Code of the State of California) and during said times the Industrial Accident Commission of the State of California has made compensation awards to all classes of its employees under said California Statute and PFE has consistently paid compensation and provided medical care and attention under and in pursuance to the terms of said Act to all of its employees injured in the State of California and the same has been accepted by said employees, and at no time has any judgment under the Federal Employers' Liability Act ever been obtained against PFE.

III.

1. It is not the fact that the PFE icing yard at Bakersfield, California, was leased to it by SP or Southern Pacific [58] Railroad Company but, to the contrary, the icing plant at Bakersfield, California and the land upon which the same was located, were owned by PFE, the icing track was owned by SP and the unloading track (now owned by PFE) was, at the time of the accident referred to in the complaint herein, leased by SP to PFE. All switching in and out of the unloading and icing tracks at Bakersfield was done by SP switch engines and crews, and in this sense all iced reefers leaving the PFE plant at Bakersfield make their initial movement by engines under the control and management of SP but some of said cars (less than 50%) were hauled in their first line movement by

Atchison, Topeka & Santa Fe Railway Company and/or Sunset Railway.

2. It is a fact that the icing service rendered by PFE under its protective service contract of July 1, 1942 between it and SP and UP applied only to SP in regard to the service under said contract by PFE at Bakersfield on June 7, 1946 at the time of the accident to plaintiff herein but it is not true that that was the only icing service rendered by PFE at Bakersfield or that the only icing service rendered by PFE was rendered under said contract, as hereinabove more fully appears.

3. At the time he was injured plaintiff and other PFE employees were engaged in unloading PFE cars and plaintiff was injured as a result of the movement of said cars by plaintiff and other PFE employees. The cars involved, and being so handled at the time plaintiff was injured were PFE reefers Nos. 62693 and 43446. The destination of said reefers on their first line haul after plaintiff was injured is unknown to PFE for the reason that after the completion of the work in which plaintiff and other PFE employees were engaged at the time plaintiff was injured said cars moved onto the lines of Atchison, Topeka & [59] Santa Fe Railway Company at Bakersfield and moved, on their first line haul, to their first destination when loaded with freight and fully iced, over the lines of Atchison, Topeka & Santa Fe Railway Company in its service and the first movement of said cars, after injury to plaintiff, was in the service of Atchison, Topeka & Santa Fe Railway Company.

4. It is not a fact that ice supplied by PFE at Bakersfield, California, was there supplied only to SP but, to the contrary, the same was supplied by PFE to other common carriers by railroad.

5. No ice used by PFE at Bakersfield was manufactured or processed by PFE at Phoenix, Arizona or El Centro or Brawley, California. PFE had an ice making plant at Colton, California, and on rare occasions, and irregularly, ice manufactured and processed at Colton, California was moved to Bakersfield, California. No ice was being so moved at the time plaintiff was injured.

WALTER H. ROGERS.

/s/ A. B. DUNNE,
/s/ DUNNE & DUNNE,
Attorneys for Defendant Pacific Fruit Express Company. [60]

State of California,
City and County of San Francisco—ss.

Walter H. Rogers, being first duly sworn, deposes and says:

I am an Officer, to-wit, the Auditor, of Pacific Fruit Express Company, a defendant in the above entitled action, and as such make this affidavit and verification. For the purpose of making this verification and affidavit I have examined the records of Pacific Fruit Express Company, reports and orders of the Interstate Commerce Commission and in respect of other matters where I have no personal knowledge I made inquiry of persons believed by me to know the facts and this affidavit and veri-

fication is made by me based on the information so acquired. I have read the foregoing statement on behalf of Pacific Fruit Express Company and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

WALTER H. ROGERS.

Subscribed and sworn to before me this 31st day of October, 1947.

(Seal) KATHRYN E. STONE,
Notary Public in and for the City and County of San Francisco, State of California. [61]

PROTECTIVE SERVICE CONTRACT

Between Pacific Fruit Express Company and Southern Pacific Company and Union Pacific Railroad Company.

Dated July 1, 1942 [62]

AMENDMENT TO PROTECTIVE SERVICE CONTRACT

Dated July 1, 1942

Pacific Fruit Express Company, Southern Pacific Company and Union Pacific Railroad Company, the parties to Protective Service Contract dated July 1, 1942, hereby mutually agree, subject to the approval of the Interstate Commerce Commission being obtained therefor, that the said Protective Service Contract be amended as follows:

1. Item (4) under Refrigeration Service, set forth in Appendix B to the Protective Service Contract, is hereby amended to read as follows:

(4) Repairs to refrigerating devices. (This item includes cleaning of tanks and drains and around hatchways.)

Per car per trip in which ice is placed in bunkers of cars for shipments when refrigeration service is covered by Section 2 of Perishable Protective Tariff $5.00

2. Item (5) under Refrigeration Service, set forth in Appendix B to the Protective Service Contract, is hereby amended to read as follows:

(5) Repairs of damage caused by top or body ice. (This item includes cleaning occasioned solely by top or body icing.)

Per car per trip in which ice is placed in body of car as follows:

10,000 pounds or less.....$ 5.00
Over 10,000 pounds, but not exceeding 15,000 pounds 7.50
Over 15,000 ..... 10.00

3. This amendment shall be effective from July 1, 1942.

In Witness Whereof, the parties hereto have executed this instrument in several counterparts, this 31st day of January, 1945, each an original and each having effect as of July 1, 1942.

PACIFIC FRUIT EXPRESS COMPANY,
By K. V. PLUMMER,
Vice President and General Manager.

Attest
(Seal) ROY G. HILLEBRAND,
Assistant Secretary.

SOUTHERN PACIFIC COMPANY,
By A. T. MERCIER,
President.

Attest
(Seal) H. J. CARROLL,
Secretary.

UNION PACIFIC RAILROAD COMPANY,
By F. W. CHARSKE,
Chairman Executive Committee.

Attest
(Seal) E. G. SMITH,
Secretary.

I. C. C. order of October 10, 1945, approved the the amendment to Item (4) of Appendix B without limitation, and approved the amendment to Item (5) of Appendix B for a limited period from July 1, 1942, to December 31, 1946, with permission to present the matter for further approval by the Commission prior to the latter date. [64]

An Agreement dated and effective July 1, 1942, by and between Pacific Fruit Express Company, a corporation of the State of Utah, herein called the "Car Line," party of the first part; Southern Pacific Company, a corporation of the State of Kentucky, party of the second part; and Union Pacific Railroad Company, a corporation of the State of Utah, party of the third part.

Southern Pacific Company acts herein for and in behalf of itself and of the railroad companies owned, operated or controlled by it, which are named in Part I of Appendix A hereto or which are hereafter included by agreement of all of the parties hereto. Southern Pacific Company and the companies for which it acts as aforesaid are herein collective called "Southern System."

Union Pacific Railroad Company acts herein for and in behalf of itself and of the railroad companies owned, operated or controlled by it, which are named in Part II of Appendix A hereto or which are hereafter included by agreement of all of the parties hereto. Union Pacific Railroad Company and the companies for which it acts as aforesaid are herein collectively called "Union System."

All of said railroad companies of both Southern

System and Union System are herein collectively called the "railroads."

The rights and obligations of the Railroads under this agreement shall be deemed several rights and obligations of each of the aforesaid Systems, and not joint rights and obligations of the Railroads.

This contract relates to the protective services against heat or cold rendered by the Car Line to property transported by the Railroads.

1. The Car Line shall undertake and perform, as the agent of the Railroads, all of the services necessary to the effective refrigeration, and/or heating of [65] commodities requiring such service transported in cars owned by Car Line or cars of other ownership when under Car Line control and shall supply the necessary ice and other means of refrigeration and/or heating. The Car Line shall perform such services when the said commodities are being transported by the Railroads and shall perform such services to the extent that the Railroads are obligated therefor for such commodities moving in cars so owned or controlled when they are in the possession of other carriers.

2. The Car Line agrees, as agent for the Railroads, to furnish ice necessary for the protection of all perishable freight handled by the Railroads, and the requisite heating appliances and fuel (when the car is moving under heater service), whether in equipment belonging to the Car Line, to the Railroads, or to other lines, and to place and maintain the same in the cars for such protection.

3. The Car Line shall receive for its services performed under this contract (except for services referred to in subsequent sections of this contract and for which the measure of compensation is expressly stated) compensation as set forth in Appendix B hereto. Such compensation shall be paid to it by the system to which the tariff revenue accrues for the services performed.

4. The Car Line further agrees to furnish ice, when necessary, to peddler, or pick-up cars transporting L.C.L. shipments of perishable freight, such ice to be furnished in the tanks of such cars and a proper charge to the Railroads is to be made therefor; also to furnish ice to the Railroads for other railroad purposes on proper requisition of the party in charge at any point where the Car Line has a supply of ice, provided the Car Line supply of ice on hand at the time is sufficient [66] for its own needs and those of the railroads. The Railroads agree to pay, and the Car Line agrees to receive, for ice furnished as specified in this section, an amount equal to the cost of such ice. In case of shortage of ice at any point the passenger trains of the Railroads shall always have preference in being supplied with ice.

Car Line also agrees in like manner to furnish to peddler or pick-up cars transporting L.C.L. shipments of perishable freight, upon the request of the Railroads (or any of them), the requisite heating appliances and fuel, the said heating appliances and fuel to be placed in the cars using the same, and a proper charge made against the Rail-

roads therefor; also to furnish heating appliances and fuel to the Railroads for other railroad purposes, on proper requisition of the party in charge, at any point where the Car Line has a supply of such heating appliances and fuel, provided the Car Line supply on hand at the time is sufficient for its own needs and those of the Railroads. A proper charge is to be made by the Car Line against the Railroads therefor.

5. The Railroads shall provide the Car Line with ice at their icing stations or houses, whenever required, at cost; provided their supply of ice on hand at the time is sufficient for their own needs and those of the Car Line.

6. Whenever and wherever the Railroads furnish ice from their own supply to refrigerator cars for the Car Line, the charge to the Car Line therefor in the tanks of the cars shall be cost.

7. The Car Line will make studies concerning charges, rules and regulations for protective service against heat or cold to be published in tariffs of the Railroads, and, upon request of the Railroads, will confer in regard thereto, and perform such other services as may be [67] required by the Railroads in regard to the preparation and publication of such tariffs.

8. The services called for by this contract shall be performed by the Car Line without unjust discrimination against or undue favor to the Southern System, the Union System, or any shipper. In the performance of such service, the orders of the System on whose tracks loading, unloading or

movement takes place shall be promptly and strictly obeyed by the Car Line.

9. Agents and employees of the Railroads and agents and employees of the Car Line shall cooperate in every reasonable and proper way to promote the mutual interests of the parties hereto with respect to business covered by this agreement.

Reports and other useful information concerning the business covered by this agreement shall be interchanged when for mutual advantage.

10. The Car Line agrees when necessary to furnish the labor required to carry out the provisions of this agreement for the refrigeration and/or heating of cars. At stations where it is impracticable or undesirable to employ a regular icing force or special employees, and the furnishing of ice or the inspection of cars moving under refrigeration or heater service is not regularly required, but where for the expeditious handling of freight the Car Line may be dependent upon the Railroads for temporary labor assistance, the Railroads agree to have their employees, acting as agents for the Car Line, promptly perform the necessary service for the Car Line. When it is necessary for the Railroads to employ extra help or incur extra expense to perform any of the foregoing services the Car Line shall reimburse the Railroads for all expense incurred thereby; it being contemplated that the payments payable by the Railroads to the [68] Car Line under Section 3 hereof are compensation for the performance of all such services by the Car Line with its own employees and at its own expense.

11. The Car Line hereby agrees that it will, and does hereby, assume all risk of loss or damage to its own property used in connection with the performance of this contract; and the Car Line furthermore agrees to indemnify and save harmless the Railroads against any and all liability for accidents howsoever caused, resulting in injuries to its officers, agents or other employees or any of them, or loss of or damage to property belonging to any such officers, agents or other employees, or any of them, on the lines of the Railroads covered by this agreement, which may be suffered by any of them on or about the property, premises, trains, engines or cars of the Railroads while acting for or in the discharge of their duties in behalf of the Car Line; and the Car Line further agrees to save harmless and indemnify the Railroads against any and all such claims whatsoever, growing out of or in any wise connected with such injury or death, or loss or damage to persons or property of any of its said officers, agents or other employees; including all court costs, counsel fees and necessary expenses growing out of any suit or claim for such injury, death, loss or damage to such person or property. The Car Line further agrees to save harmless and indemnify the Railroads against any and all claims of whatsoever kind growing out of or in any wise connected with any injury or death or loss or damage to any other person or property on or about the property, premises, trains, engines or cars of the Railroads, including all court costs, counsel fees and other necessary expenses when caused by or

resulting from any accident for which the Car Line or its officers, agents, or other employees may be responsible, or from any acts of such officers, agents, or employees, or any of them, when acting for or in the discharge of their duties to the Car Line. [69]

12. The Car Line agrees that it will be responsible to and will indemnify the Railroads for all damages to perishable freight arising from flooding, improper refrigeration or heating which it has agreed to perform hereunder, defects in cars, or inattention to drain pipes, on shipments moving under refrigeration or heater service, for which damages the Railroads are responsible and pay. The Car Line shall reimburse the Railroads for any expenditures made by them on account of such damages, including the Railroads' proportion of payments made in settlement of such damages the responsibility for which cannot be located; but the Car Line shall not be held responsible for damages to less than carload shipments handled in peddler cars except when, through the negligence of the Car Line, such damages result from insufficient icing or the furnishing of defective, insufficient or improper heating appliances or fuel.

The Car Line shall not be responsible for damages resulting from freezing unless the freezing was caused by improper refrigeration or heating or defects in cars moving under refrigeration or heater service.

13. The Car Line shall not assume responsibility for damages arising from defective equip-

ment when such equipment is not the property of, or in control of, or furnished by, the Car Line.

14. When a delay in the handling of cars by the Railroads between icing stations exceeds twelve hours, and such delay has caused a reduction of ice in the bunkers of any car of fifty (50) percentum or more, the responsibility for damage to the shipment, to the extent attributable to such delay, shall be assumed by the Railroads; provided that the bunkers in said cars were properly iced in accordance with instructions when said car was moved from the last regular icing station at which it was required to be iced. When such delays occur the Railroads shall [70] notify the local representative of the Car Line who shall arrange for re-icing at intermediate or emergency icing station.

The Car Line shall not be held responsible for failures to ice cars due to the neglect of the Railroads to promptly set cars at regular icing stations for icing in accordance with then existing instructions.

15. The Railroads shall, in so far as they lawfully may, furnish transportation to such employees of the Car Line in pursuance of their duties under this agreement as shall be designated by the Car Line, provided the issuance of such transportation comes within the customs and practices of the Railroads in connection with their own employees.

16. The Railroads shall furnish the Car Line such telegraph and telephone service over their own wires, as they lawfully may, for the proper conduct of the business of the Car Line covered by this agreement.

The Railroads will also make requests upon the Western Union Telegraph Company for the issuance of franks for the Car Line customary for the conduct of business of the Railroads, in so far as such franks may be lawfully issued.

Any service rendered over wires leased by the Railroads will be paid for by the Car Line on the basis of number of telegrams handled for the Car Line as compared with the total number transmitted over such leased wire.

The provision contained in this section 16 relative to furnishing franks and/or telegraph service to the Car Line is subject to such modifications as are or may be necessary to conform to the provisions of any agreements now or hereafter existing between The Western Union Telegraph Company and the Railroads. [71]

17. The cost of installing tracks at ice plants necessary for the icing of cars in transit or for transit shall be borne by the Railroads.

18. The Car Line shall provide and maintain at its expense fixed properties such as icing stations or icing platforms necessary for the proper conduct of the business of the Railroads. The Railroads shall at their cost install such tracks as are necessary for the icing of cars enroute or pre-icing for shipment. Any tracks necessary for the loading or unloading of ice, or for the loading or unloading of material and supplies at plants of the Car Line shall be installed and maintained at its expense. The ground necessary for such improvements and tracks of the Car Line now installed on

property of the Railroads with their consent shall be furnished by the Railroads at a rental of six (6) per centum per annum computed on the value of such property. The ground necessary for such improvements hereafter installed on property of the Railroads with their consent shall be furnished by the Railroads at an annual rental based upon the value thereof and the current rate of interest as then determined.

The Car Line shall pay all taxes upon such ground rented from the Railroads, including the improvements thereon.

Whenever, under the terms of this agreement, ground belonging to the Railroads (with or without improvements or facilities) is rented or leased to the Car Line, the value of such ground and facilities shall be determined in the following manner, to wit: the value shall, in the first instance, be fixed by the owner of such land and the amount so fixed shall be reported in writing to the Car Line. If no written objection is made to such value by the Car Line within ninety days from the receipt of such report such value shall be conclusive. If written objection is made by the Car Line within ninety days and [72] the owner and the Car Line cannot agree upon a proper value, they shall then call in a disinterested and qualified third person to act as arbitrator, and the value fixed by him shall be conclusive upon the parties in interest. All assessments chargeable to capital account upon such properties made after the determination of the value thereof shall be added to the value deter-

mined as aforesaid and be deemed thereater included in the value thereof as a basis of rentals.

19. The Car Line with the consent of the Railroads in each instance shall have the privilege of having work performed for it in any department of the Railroads, paying for such work the cost thereof plus usual percentages.

20. In the event that the Railroads furnish the Car Line with any tools, supplies, appliances, material or equipment of any kind, the charge therefor shall be the cost to the Railroads at the station where the said tools, supplies, appliances, material or equipment are furnished, plus five (5) per centum for superintendence. The actual cost at the station where furnished shall include store expense (if any incurred) and freight charges at tariff rates.

21. The Car Line shall keep complete records, including seal records, of the handling, passing, icing and heating of refrigerator cars, including peddler or pick-up cars, which contain shipments moving under refrigeration or heater service, perform service incidental to the refrigeration service of the Railroads, and furnish to the carriers, shippers, consignees or connecting lines, necessary information as to the service on the lines of the Railroads. The Railroads agree that their agents or other employees shall, at stations where it may become necessary to keep the local records of handling, and furnish the Car Line necessary reports of such service. The Railroads shall, however, be consulted as to the necessity for [73] such local

records, and in case the Railroads decide that certain of them are of insufficient value to warrant the expense of compiling them, they shall be discontinued, or others shall be substituted for them at the request of the Railroads.

22. In case the Railroads require it, the Car Line shall furnish ice for filling any of the Railroads' ice houses, provided the Car Line's supply of ice on hand at the time is sufficient for its own needs and those of the Railroads, and the charge therefor shall be the cost of the ice on board the cars at the point where manufactured or furnished, or at siding at pond where the ice was cut.

23. Any controlled but independently operated railroad company of either the Southern System or the Union System may, with the consent of its parent company, make direct settlements with the Car Line of accounts solely between said controlled railroad company and the Car Line.

24. Southern Pacific Company and Union Pacific Railroad Company severally guarantee, each to the other and each to the Car Line, that each and all of the owned, operated and controlled railroad companies, members of its system, covered by this agreement shall comply with and perform all of the terms hereof applicable to such company, in like manner as though such company were a formal party hereto.

25. This agreement shall inure to the benefit of and be binding upon the successors and assigns of the respective parties hereto. Nothing in this agreement shall confer any rights upon any party

other than the parties executing this agreement and the companies named in Appendix A hereto, and their successors or assigns.

26. Upon being approved by the Interstate Commerce Commission, this agreement shall become effective on the first day of July, 1942, superseding as of that date the agreement between the parties hereto dated July 1, 1936, with respect to subject matter covered by this agreement. It shall continue in effect until December 31, 1943, and from year to year thereafter unless and until terminated by written notice of at least one year, given by one of the parties hereto to each of the others, of its election to terminate this agreement on December 31st of the year 1943, or of any year thereafter.

In Witness Whereo, the parties hereto have executed this instrument in several counterparts, each an original and each having the effect of all, as of the day and year first above written.

PACIFIC FRUIT EXPRESS COMPANY,
By H. GIDDINGS,
Vice President & General Manager.

(Corporate Seal)

Attest:

ROY G. HILLEBRAND,
Assistant Secretary.

SOUTHERN PACIFIC COMPANY,
By W. A. WORTHINGTON,
Vice President.

(Corporate Seal)

Attest:

W. F. BULL,
Secretary.

UNION PACIFIC RAILROAD COMPANY,
By F. W. CHARSKE,
Chairman Executive Committee.

(Corporate Seal)

Attest:

E. G. SMITH,
Secretary. [75]

Appendix A.

Part I.

The following companies, owned, operated or controlled by Southern Pacific Company, are included in contract between Pacific Fruit Express Company and Southern Pacific Company and Union Pacific Railroad Company dated July 1, 1942, and are collectively called therein "Southern System":

Southern Pacific Company
Texas and New Orleans Railroad Company
Holton Inter-Urban Railway Company
Northwestern Pacific Railroad Company
Pacific Electric Railway Company
Petaluma and Santa Rosa Railroad Company
San Diego and Arizona Eastern Railway Company
Visalia Electric Railroad Company

Part II.

The following companies, owned, operated or controlled by Union Pacific Railroad Company, are included in contract between Pacific Fruit Express

Company and Southern Pacific Company and Union Pacific Railroad Company dated July 1, 1942, and are collectively called therein "Union System":

Union Pacific Railroad Company

Saratoga and Encampment Valley Railroad Company

Yakima Valley Transportation Company [76]

Appendix B

Unit Services and Prices

Refrigeration Service:

(1) Ice.

(a) Delivered in bunkers of a refrigerator car —per ton, $ (See Note).

(b) Delivered on top of load in body of car— per ton, $ (See Note).

Note: Southern System or Union System, as the case may be, will pay the Car Line the latter's cost per ton of ice so delivered, but upon the occurence of any event which shall make it appear that the yearly weighted average cost per ton of the ice so to be paid for by Southern System, during any calendar year, shall exceed $3.80 per ton, delivered in bunkers, or $5.81 per ton, delivered on top of load in bodies of cars, or that the yearly weighted average cost per ton of ice to be paid for by Union System, during any calendar year, shall exceed $4.53 per ton, delivered in bunkers, or $5.16 per ton, delivered on top of load in bodies of cars (said sums representing the estimated yearly weighted average costs per ton), the Car Line shall immediately advise the Southern Pacific Company, if such excess be for the Southern System, or the

Union Pacific Railroad Company, if such excess be for the Union System, of such fact, and the amount by which the estimated yearly weighted average cost probably will be exceeded and the reasons therefor, and the Railroad, so advised, in turn, will promptly transmit such information to the Interstate Commerce Commission. [77]

Cost per ton of ice delivered in bunkers, or on top of load in bodies of cars, shall include production cost, maintenance and running expenses of ice plants, storage houses, icing platforms, cost of ice purchased, freight charges at Company-material rate of 5 mills per ton-mile for transportation of ice, and a proper proportion of general expenses. In computing such costs, there shall be included a return at the rate of 6 per cent per annum on the value of property of the Car Line employed, depreciation at the rate of 4 per cent per annum on the book cost of such property subject to depreciation, and applicable taxes.

(2) Salt.

Delivered in bunkers of a refrigerator car—per 100 pounds ..... $ .75

~~(3) Supervision. ("Supervision" as used here, is as defined in 222 I.C.C. 245, at page 250.)~~

~~(a) Per icing in bunkers of a refrigerator car ..... $2 .55~~

~~(b) Per icing in body of a car ..... $2.55~~

By amendment executed April 8, 1942, this item (3) under Refrigeration Service was amended to read as follows:

(3) Supervision: ("'Supervision' as used here, is as defined in 222 I. C. C. 245, at page 250.)

(a) Per icing in bunkers of a refrigerator car $1.52

(b) Per icing in body of a car.....$1.52

(c) Per trip per car when refrigeration services covered by Section 2 of Perishable Protective Tariff are performed $1.97

(Charges under Items (3) (a) and (3) (b) will be paid by the System on the lines of which the icings are performed. Charges under Item (3) (c) will be paid by the System handling the shipments from the point from which any charge under Section 2 of the Perishable Protective Tariff is first applicable. All other services specified in this Appendix will be paid in accordance with Section 3 of this Contract.)

(4) Repairs to refrigerating devices. (This item includes cleaning of tanks and drains and around hatchways.)

Per car per trip in which ice is placed in bunkers $5.00

(5) Repairs of damage caused by top or body ice. (This item includes cleaning occasioned solely by top or body icing.)

Per car per trip in which ice is placed in body of car for protection of perishable freight.. .$6.01

(6) Precooling of a refrigerator car.....$6.63

(7) Papering cars—per car papered for protection against heat.

(a) For juice loading.....$10.93

(b) For shrimp loading in steel cars.....$ .56

(c) For shrimp loading in wood cars.....$1.36

Heater Service:

(1) Car Heaters. (This item covers the entire cost of furnishing heaters.)

Per inspection incident to heater service...$ .22

(2) Heater Fuel. (This item covers the delivered cost of fuel in storage.)

Per inspection incident to heater service..~~$.13~~.10†

Note: If the cost of fuel furnished by Car Line during any calendar year to either System shall in fact exceed the aggregate charges therefor during such year upon the stated unit price per inspection, such System shall pay the Car Line the amount of such excess. Immediately upon the occurrence of any event which shall make it appear that such excess payments will be made by either System, the Car Line shall advise the Southern Pacific Company, if such excess payments will be for the Southern System, and the Union Pacific Railroad Company, if such excess payments will be for the Union System, and of the probable amount thereof, and the Railroad, in turn, will promptly transmit such information to the Interstate Commerce Commission.

(3) Servicing of Heaters.

Per inspection incident to heater service....$ .72

(Each installation, removal, or other attention, whether or not any fuel is supplied, fires lighted or extinguished, or other manipulation performed, shall be considered an inspection.)

(4) Supervision. ("Supervision" as used here is as defined in 222 I. C. C. 245, at page 250, except

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†By amendment executed April 8, 1942 this unit price was changed from $.13 to $.10. [80]

that it relates to time devoted to shipments afforded protective service against cold instead of refrigeration service.)

Per inspection incident to heater service....$ .34

(5) Papering Cars.

Per car papered for protection against cold.$1.01

(6) Preheating of Cars.

Per car preheated.....$ .95

Ventilation Service:

(1) Supervision. ("Supervision" as used here is as defined in 222 I. C. C. 245, at page 250, except that it relates to time devoted to shipments moving under ventilation service instead of refrigeration service.)

Per inspection, whether or not ventilating devices are manipulated .....$ .54

Loss and Damage Claim Expenses:

(1) Hazard. (This item covers a reasonable allowance to cover liability assumed by the Car Line in respect of claim payments and all expenses incident to the investigating, handling, defense and payment of claims.) [81]

(a) For each car moving under refrigeration service—per trip .....$ .34

(b) For each car moving under heater service—per trip $1.07

The parties hereto recognize that the foregoing unit prices are experimental in character, and that the reasonableness thereof will be affected by changing price and wage levels and other circumstances, and, therefore, agree that the said unit prices, or any of them, may be revised at any time by agreement of the parties hereto, subject to the

provisions of Section 1 (14) (b) of the Interstate Commerce Act, as amended, and the parties agree, further, that upon request of any party hereto, re-examination will be made of said unit prices by all of the parties, to the end of agreeing upon such adjustments as may be just, reasonable and proper under the conditions then prevailing.

[Endorsed]: Filed Nov. 10, 1947. [81-A]

[Title of District Court and Cause.]

OPINION

Goodman, District Judge.

This case involves the right of plaintiff, an employee of Pacific Fruit Express Company, a corporation engaged in railroad refrigeration service, to maintain an action for damages under the Federal Employers' Liability [82] Act, (45 USC Sec. 51) against the Pacific Fruit Express Company and the Southern Pacific Company, a railroad common carrier.

The parties have stipulated that upon the pleadings and stipulation of facts submitted at pre-trial conference, the Court shall determine whether plaintiff, at the time of the accident and injury complained of, was an employee of a common carrier by railroad within the meaning of the Federal Employers' Liability Act. The parties have also agreed that if the court resolves the question in favor of plaintiff, the cause may be set for trial; otherwise appropriate judgment disposing of the cause may be entered, in which event exception may be reserved to the plaintiff.

THE FACTS

At the time of the accident described in the complaint plaintiff was employed as an ice man in the icing yard and plant owned and operated by the Pacific Fruit Express Company at Bakersfield, California. He and fellow employees were engaged in unloading ice from a refrigeration car belonging to the Express Company. While plaintiff was aiding in moving an empty car from a loading platform, the wheels of a loaded car, which was being drawn up to the platform by a cable and winch, struck and injured him.

Pacific Fruit Express Company is a corporation which was organized in 1906 and commenced operations October 1, 1907. Its business is the hiring to common carriers by rail, of cars (known as "reefers") specially designed to transport perishable commodities, and providing such cars –and similar cars of other companies when presented to it by a common carrier by rail,—with heater and refrigeration service to protect their contents against temperature changes and excesses. It also repairs, in its shops, the cars of [83] other car companies. Since its inception, Pacific Fruit Express Company has had the same two stockholders, owning its entire outstanding issue in equal shares. They are the defendant Southern Pacific Company and the Union Pacific Railroad Company, both corporate common carriers by railroad engaged in part in interstate commerce. The two stockholders have no connection each with the other through stockholdings or common directors. Prior to the organi-

zation of Pacific Fruit Express Company, the two railroads obtained the type of service, thereafter provided by Pacific Fruit Express Company, from third persons under contract. At no time have they directly provided such services to their shippers, nor themselves owned any "reefers."

Pacific Fruit Express Company rents its reefers not only to its stockholders, but also to other common carriers for use in railroad service throughout the United States. Rental is charged at a uniform rate on a mileage basis. Pacific Fruit Express Company also provides, for a consideration, heater and refrigeration protective service similar to that furnished Southern Pacific Company and Union Pacific Railroad Company, to other carriers whose lines give them access to the plants of the Pacific Fruit Express Company.

In furtherance of its activities, Pacific Fruit Express Company owns and operates in several states, near the facilities of rail common carriers, plants, car shops, material and equipment for the maintenance, repair, rebuilding and servicing of reefers and heater units, and for the manufacture of ice. The ice yard at Bakersfield where plaintiff was injured was such a plant. Service is provided from that plant to Southern Pacific Company and to two other common carriers as well. (A. T. & Santa Fe and Sunset Railway.) [84]

In 1946, Pacific Fruit Express Company's net worth was over $40,000,000.00. Some of its assets (real estate) have been acquired from its stockholders by purchase and lease; the remainder, from

other sources including concerns which had theretofore provided similar protective service to Southern Pacific Company and Union Pacific Railroad Company.

The business of the Pacific Fruit Express Company is conducted through and by its own officers and employees who, except for directors having railroad connections, are not employed by any other firm, person or corporation. At the Bakersfield plant where plaintiff was injured, there were no employees of Southern Pacific Company engaged in performing services on behalf of Pacific Fruit Express Company.

In the performance of its business, Pacific Fruit Express Company neither moves nor controls the movement of "reefers" to and from or beyond its icing docks and plants. Such movements are handled by rail common carriers, principally Southern Pacific Company or Union Pacific Railroad Company. This was true in the case of the cars being unloaded when plaintiff was injured. Pacific Fruit Express Company possesses no rail motive power, except one plant locomotive used for shop switching purposes. The only railroad tracks owned by Pacific Fruit Express Company are shop tracks and unloading tracks. The former are used only in the operation of its car shops. The latter are used only for deliveries of ice to Pacific Fruit Express Company for use in its icing service. The only movement of reefers by Pacific Fruit Express Company are at its own shops and plants, on and along these tracks. These movements are incidental to the

repair and rebuilding of reefers in the Pacific Fruit Express Company shops and the servicing of reefers at the Pacific Fruit Express Company ice plants. [85]

Both Southern Pacific Company and Union Pacific Railroad Company supply their shippers with "reefer" protective service under Perishable Protective Tariff No. 14, through the Pacific Fruit Express Company. The shippers specify to the carrier, in writing, the type of service desired; they may, by written order, change the type of service originally requested. There are various kinds of service available to the shippers under the tariff. The shipper's orders are transmitted by the carrier to the Pacific Fruit Express Company. The only orders given Pacific Fruit Express Company by Southern Pacific Company or Union Pacific Railroad Company in the performance of protective service are those whereby the orders of the shipper relating to the character of service desired, are transmitted. Pacific Fruit Express Company transacts none of its protective service business directly with the shippers. It publishes no tariffs, issues no bills of lading and makes no charges for such services except to common carriers by rail, to whom it is solely responsible and from whom alone it receives its compensation. The same is true of its car hiring business, except for the letting of a few 'reefers" to shippers on a monthly basis, but not as a part of its regular operations. The only other revenue of Pacific Fruit Express Company is derived from other car companies for

the repair of their cars delivered at Pacific Fruit Express Company shops.

Superceding an earlier contract dated July 1, 1936, the Pacific Fruit Express Company on July 1, 1942, entered into a written contract with the Southern Pacific Company and the Union Pacific Railroad Company. This contract contained the terms and provisions relating to so-called protective service against heat or cold to be performed by the express company for property transported by the railroad [86] companies. This contract, after having been approved by the Interstate Commerce Commission, has been effective continuously since July 22, 1942. In general the contract fixed the compensation to be paid Pacific Fruit Express Company; provided for certain services to be rendered to the railroad companies; fixed the formulas for cooperation between the employees of Pacific Fruit Express Company and the railroad companies; provided for indemnification of the railroad companies against liability for injury or damage to personnel or property of the railroad companies while acting on behalf of the Pacific Fruit Express Company; fixed and delineated responsibility of the Pacific Fruit Express Company for damage to any freight as a result of any improper service on the part of the express company, and otherwise, in respects not necessary to be detailed, prescribed the operating duties and liabilities of the parties. Paragraph 8 of the agreement has been discussed in detail by the plaintiff and urged by him as being vital to the determination

of the issue. It provides that "orders of the system on whose tracks loading, unloading or movement takes place shall be promptly and strictly obeyed." Likewise plaintiff places reliance on paragraph 1 of the agreement which provides that the Pacific Fruit Express Company shall perform the services specified in the contract "as the agent of the railroads."

DISCUSSION

Plaintiff contends that the Pacific Fruit Express Company is a common carrier by railroad and hence within the reach of the Federal Employers' Liability Act. The Court holds to the contrary. The act itself subjects freight common carriers by railroad, while engaging in commerce between any of the several states or territories, [87] to liability in damages to any person suffering injury while employed by such carrier in such commerce. 45 USC 51. There does not seem to be any doubt at all that the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of a common carrier by railroad. Ellis v. Interstate Commerce Commissioner, 237 U.S. 434; U.S. v. Fruit Growers Express Co. 279 U.S. 363; Wells Fargo & Co. v. Taylor, 254 U.S. 175; U. S. ex rel. Chicago Refrigerator Company v. Interstate Commerce Comm. 265 U.S. 292; Reynolds v. Addison Miller Co. 143 Wash. 271, 255 Pac. 110.

The Federal Employers' Liability Act was

amended in 1939. At that time, despite earlier decisions, some of which have been cited, no effort was made to include refrigerator companies within its terms. Congressional inactivity in that regard must be given its usual implication, i.e. acquiescence in the judicial rulings. [1]* Federal legislation concerning the social security of of employees employed in Interstate Commerce specially included employees of Refrigerator Companies within the meaning of the term carrier,*[2] thus indicating Congressional awareness of the actualities. Thus the terms of the statute, plus the judicial interpretations of its meaning and the obvious knowledge of the Congress over a long period of time as to such judicial pronouncements, make it abundantly clear that Pacific Fruit Express Company itself is not a common carrier by rail and not subject to the provisions of the Act. [88]

The record does not disclose any circumstance in any way indicating that either the organization of Pacific Fruit Express Company nor its subsequent operations purposed any duplicitous design to accomplish evasion of the Act. The Pacific Fruit Express Company was organized to commence business before the enactment of the Liability Act. It acquired none of its operating facilities from its

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*[1] U.S. v. Elgin, Joliet & Eastern R.R. Co. 298 U.S. 492, 500.

*[2] The Railway Labor Act, 45 USC 151; The Railroad Retirement Act, 45 USC 228a; The Railroad Retirement Tax Act, 26 USC 1532; The Carriers Taxing Act, 45 USC 261; Railroad Unemployment Insurance Act, 45 USC 351.

railroad stockholders; the railroad stockholders are distinct and separate entities. The Pacific Fruit Express Company operates under its own management with its own facilities and employees who are not otherwise employed. Also it serves other carriers and car companies in addition to the two railroad stockholders. Consequently there is no basis for concluding that the Pacific Fruit Express Company was used by the defendant Southern Pacific Company "as a device to obtain the forbidden end." Ellis v. Interstate Commerce Comm. supra.

It is also urged by the plaintiff that the corporate organization of the Pacific Fruit Express Company and its relation to the Southern Pacific Company so identifies and integrates it with that railroad as to make it as well a common carrier by rail. It is true that the Pacific Fruit Express Company came into being with the prime purpose of furthering the transportation enterprise of its two stockholder railroads. It may be said that the two railroad companies could themselves well have performed the functions of Pacific Fruit Express Company as an integral part of their own common carrier business. But, absent trickery or device, this factor cannot in law make the Pacific Fruit Express Company the alter ego of the Southern Pacific Company. Ellis v. Interstate Commerce Comm. supra; U. S. v. Elgin, Joliet & Eastern R.R. Co., supra. [89]

Section 5 of the Federal Employers' Liability Act, 45 USC 55, provides as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which

shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

The creation of the Pacific Fruit Express Company, although intended to further the transportation business of its two railroad stockholders, occurred before the Act was passed. There is therefore no basis for a charge that creation of Pacific Fruit Express Company violated Section 5. Chicago, R. I. etc. v. Bond, 240 U.S. 449; Robinson v. B. & O., 237 U.S. 84; Wells Fargo v. Taylor, supra.

It is suggested that the so-called indemnity clause of the Protective Service Contract amounts to a violation of Section 5. But inasmuch as this clause is one merely of indemnity, it does not have the effect of exempting the railroads from their liability as common carriers under the Act. Hence in no sense may it be considered a violation of Section 5.

We come now to the more substantial contention urged by the plaintiff—that the Protective Service Contract of July 1, 1942, created an agency relationship between the Pacific Fruit Express Company and the Southern Pacific Company. Paragraphs 1 and 8 of the agreement, heretofore cited, are urged by plaintiff as strong evidence that in all activities under the contract, the Pacific Fruit Express Company was no more than an agent of the Southern Pacific Company and hence that the latter is the real employer of plaintiff and subject to suit under the Act. Assuming the existence of

an agency relationship between Pacific Fruit Express Company and the Southern Pacific Company, nevertheless [90] nothing of record indicates that plaintiff was injured while pursuing activities related to the alleged agency relationship between the two defendants. The Pacific Fruit Express Company performed refrigeration services at Bakersfield in addition to those covered by the contract of July 1, 1942. It also served the Atchison, Topeka and Santa Fe Ry. and the Sunset Railway. The eventual destination of the ice which plaintiff was helping to unload at the time of his injury was neither known or foreseen at the time. Thus nothing in the record indicates that the plaintiff was injured while employed in the service of his master's master.

But in a broader sense, it is clear to the court that the contract of July 1, 1942, viewed in its entirety, was not a contract of employment at all. With its terms vitalized by actual operation this becomes manifest. The express provision of the agreement that the protective service furnished by the Pacific Fruit Express Company was "as the agent of the railroads" does not bring into existence an agency relationship, if one does not, in fact, exist. It is the sum total of the position and dealings of the parties which fixes their legal status. Whenever a legal relationship is a creature of contract, the contractural terms coupled with the meaning they have acquired from practical application, determine the nature of the relationship created. Hearst Publications Inc. v. U.S. 70 Fed.

Supp. 666; affirmed F.2d ; Pacific Lumber Company v. Ind. Acc. Comm. 22 Cal. 2d 410; Matcovich v. Anglim, (9 Cir.) 134 F.2d 834. Furthermore, the mere use of the word "agent" does not bring into being the status of master and servant or employer and employee. For the term "agent" is not infrequently used to designate prescribed activities in many [91] independent contract relationships. State etc. Fund v. I.A.C. 216 Cal. 351, 361.

The terms of the Protective Service Contract, as well as the manner of its performance, indubitably constitute the parties independent contractors. The Pacific Fruit Express Company performed with its own employees at its own expense. No right of control over the manner and means of performance was reserved to the railroads. Hearst Publications Inc. v. U.S. supra.

To be sure, certain conditions of performance and means of cooperation and assistance are specified in the contract. But these provisions, directed to the successful accomplishment of the contract's broad objectives, do not invest the railroads with control of the method of performance. L.A. Athletic Club v. U.S. 54 F. Supp. 702, at 706. cf. Radio City Music Hall v. U.S. 135 F.2d 715, at 718. Hull v. Phila. R.R. 252 U.S. 475, 480.

Cases, such as Penn. R.R. Co. v. Roth, 163 F.2d 161, in which the railroad company employed a contractor to operate one of its railroad yards, are not apropos, for there is absent here that substantial degree of control over the manner and means

of performance as was present in Penn. R.R. Co. v. Roth and like cases. See Chicago R.I. v. Bond, supra.

The remedial and humanitarian purposes of the Employers' Liability Act in no way compel an interpretation of the contract in favor of an employment or agency relationship. It is not amiss to point out that plaintiff is not without redress for his injuries. The benefits of the Workmens' Compensation Act of California are available to him. It is not for the courts to extend the coverage of the Act into new fields. During the 40 year life of the Employers' Liability Act, Congress, while liberalizing its benefits, has [92] not seen fit to extend the scope of the statute beyond railroading in its true sense.

The contention, that plaintiff's activities at the time of the accident were in connection with a railroad movement, is unsubstantial. It is true at the time one car was being manually pushed away from the loading platform, while another was being driven up by a cable and winch. A railroad movement connotes something more than the mere movement of a car over a rail. Certainly this is not enough to constitute common carriage by rail.

For the reasons stated, the cause is dismissed.

Dated: June 29, 1948.

[Endorsed]: Filed June 29, 1948. [93]

In the District Court of the United States for the Northern District of California, Southern Division

No. 27065-G

ROBERT H. GAULDEN,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, PACIFIC FRUIT EXPRESS COMPANY, a corporation,

Defendants.

JUDGMENT

Heretofore, in the above entitled action, defendants filed their answer to plaintiff's complaint and, agreeably to the order of this Court, the plaintiff filed a reply. Thereafter the plaintiff served and filed interrogatories, defendants served, and filed objections thereto, and the said cause and said objections came on duly and regularly to be heard before the Court on pre-trial conference. Upon said pre-trial conference by stipulation in writing, filed herein on November 10, 1947, narrative statements were filed herein and the same were deemed answers to said interrogatories, and in and by said stipulation it was provided that the issue of application of the Federal Employers Liability Act be submitted for decision on pre-trial conference on the pleadings, the stipulation, and the said statements of fact and that if the [94] Court determined that the said act did not apply it might make appropriate order and judgment disposing of the cause. Said stipulation was ap-

proved by order of the Court. The matter, having been submitted to the Court upon said stipulation and statements of fact, the Court considered the same. Thereafter and on June 29, 1948, the Court filed herein its written opinion and order stating the facts, the Court's conclusions of law, and ordering that the action be dismissed and now, the premises considered, it is

Ordered, Adjudged and Decreed that plaintiff take nothing by this action and that defendants go hence without day and have and recover of and from the plaintiff their costs of suit herein taxed at $.....

Done in open Court this 28th day of July, 1948.

LOUIS E. GOODMAN,
District Judge.

Approved as to form, as provided in rule 5(d).

RYAN & RYAN,

By THOS. C. RYAN,
Attorneys for Plaintiff.

Entered in Civil Docket July 28, 1948.

[Endorsed]: Filed July 27, 1948. **[95]**

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS UNDER RULE 73-B

Notice is hereby given that Robert H. Gaulden, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from

the Final Judgment entered in this action on July 28, 1948, and from the Order, dated June 29, 1948, dismissing the above-entitled action and upon which said Order the aforesaid Judgment is based.

Dated July 28, 1948.

/s/ DANIEL V. RYAN,
/s/ THOS. C. RYAN,
Attorneys for Appellant,
Robert H. Gaulden.

[Endorsed]: Filed July 28, 1948. [96]

Fireman's Fund Indemnity Company
Bond No. J-70011

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Robert H. Gaulden, Plaintiff and Appellant in the above-entitled action, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and entered against it in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Defendants in said action, on the 28th day of July, 1948.

Whereas, the said appellant is required to give an undertaking for costs on appeal as hereinafter conditioned.

Now, Therefore, Fireman's Fund Indemnity Company of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said appellant and acknowledges itself

bound to the said Defendants in the sum of Two Hundred Fifty and No/100 Dollars ($250.00) that the said appellant will pay all costs which may be adjudged against it on said appeal or on a dismissal thereof, not exceeding, however, the sum of Two Hundred Fifty and No/100 Dollars ($250.00).

It Is Further Stipulated as a part of the foregoing undertaking that in case of the breach of any condition thereof, the above entitled District Court may, upon notice to the Surety of not less than 10 days, proceed summarily in said proceedings to ascertain the amount which the said surety is bound to pay on account of such breach and render judgment therefor against the said surety and award execution thereof.

Signed, sealed and dated this 28th day of July, 1948.

FIREMAN'S FUND
INDEMNITY COMPANY,

(Seal) /s/ A. J. CLEFFI,
Attorney-in-Fact.

(Verification.)

The premium charged for this bond is Ten and No/100 Dollars per annum. [97]

[Endorsed]: Filed July 28, 1948.

[Title of District Court and Cause.]

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now plaintiff and appellant, Robert H. Gaulden, and presents herewith his designation of

points on which he intends to rely on appeal:

1. That the Pacific Fruit Express Company is a common carrier by railroad under the terms of the Federal Employers' Liability Act, particularly in view of the Agency Contract between the Pacific Fruit Express Company and the Southern Pacific Company, which plaintiff and appellant contends constitutes sufficient control by defendant, Southern Pacific Company, over the employees of Pacific Fruit Express Company to constitute the Pacific Fruit Express and plaintiff, its employee, as agents of the defendant, Southern Pacific Company, a common carrier by rail [98] road, at the time of plaintiff and appellant's injury.

2. The voluntary payments by the Pacific Fruit Express Company under the State Industrial Accident Commission of California is no bar to recovery under the Federal Employers' Liability Act, but such voluntary payments may be deducted against any judgment that might be obtained under the Federal Employers' Liability Act.

Dated July 28, 1948.

/s/ DANIEL V. RYAN,
/s/ THOS. C. RYAN,
Attorneys for Plaintiff and Appellant, Robert H. Gaulden.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed July 28, 1948. [99]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above-entitled Court; and to defendants and appellees, Southern Pacific Company, a corporation, Pacific Fruit Express Company, a corporation, and to Messrs. Dunne & Dunne, attorneys for said defendants:

You, and each of you, will please take notice that plaintiff and appellant herein, Robert H. Gaulden, hereby makes the following designation of contents of record on appeal:

1. The complaint.

2. The answer.

3. The pre-trial written stipulation and order filed November 10, 1947.

3-a. Interrogation and additional interrogation.

4. The narrative statements by defendants in answer to interrogatories.

5. The copy of the Protective Service Contract [100] between the Pacific Fruit Express Company, the Southern Pacific Company and the Union Pacific Railroad Company, dated July 1, 1942.

6. The reporter's transcript, including the stipulation of facts made verbally at a pre-trial conference, dated October 13, 1947.

7. The opinion and order of the trial Judge, Honorable Louis E. Goodman, filed June 29, 1948.

8. Notice of appeal on which appellant intends to rely on appeal.

9. Statement of points.

10. Judgment.

Dated July 28, 1948.

/s/ DANIEL V. RYAN,

/s/ THOS. C. RYAN,

Attorneys for Appellant and Plaintiff, Robert H. Gaulden.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed July 28, 1948. [101]

[Title of District Court and Cause.]

DEFENDANTS' (AND APPELLEES') DESIGNATION OF RECORD

Comes Now the Defendants and Appellees and, agreeably to Rule 75 of the Federal Rules of Civil Procedure, they and each of them designates additional portions of the record, as follows:

1. This designation.

2. The Reporter's Transcript of the proceedings had in the week of June 28, 1948.

3. Defendant's objections to interrogatories and additional interrogatories or request therefor.

4. Defendants' notice of motion to compel reply [102] to defenses and supporting affidavit.

5. Reporter's Transcript of proceedings had on motion to compel reply, in proceedings of June 30, 1947.

6. Order directing plaintiff to reply to defenses.

7. Plaintiff's reply.

Dated at San Francisco, July 29, 1948.

/s/ ARTHUR B. DUNNE,

/s/ DUNNE & DUNNE,
Attorneys for Defendants and Appellees.

Receipt of a copy of the within designation is hereby admitted this 30th day of July, 1948.

/s/ RYAN & RYAN,

By /s/ DANIEL V. RYAN,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed July 30, 1948. [103]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION

Good cause appearing therefor, it is hereby ordered that plaintiff and appellant above named, Robert H. Gaulden, may have an extension of forty (40) days, that is, to and including October 16,

1948 within which to file the record on appeal and docket the action herein in the United States Court of Appeals for the Ninth Circuit.

Dated September 7th, 1948.

LOUIS E. GOODMAN,
Judge of the District Court.

No previous extension granted. Notice of Appeal was filed on July 28, 1948.

[Endorsed]: Filed Sept. 7, 1948. [104]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 104 pages, numbered from 1 to 104, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Robert H. Gaulden, Plaintiff, vs. Southern Pacific Company and Pacific Fruit Express Company, Defendants, No. 27065-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $13.20, and that said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court at San Francisco, California, this 13th day of October, A. D. 1948.

(Seal) C. W. CALBREATH,
Clerk. [105]

[Endorsed]: No. 12062. United States Court of Appeals for the Ninth Circuit. Robert H. Gaulden, Appellant, vs. Southern Pacific Company and Pacific Fruit Express Company, Appellees. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 14, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 12062

ROBERT H. GAULDEN,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, and PACIFIC FRUIT EXPRESS COMPANY, a corporation,

Appellees.

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now appellant and plaintiff, Robert H. Gaulden, and presents herewith his designation of points on which he intends to rely on appeal:

1. That Pacific Fruit Express Company is a common carrier by railroad under the terms of the Federal Employers' Liability Act, particularly in view of the Agency Contract between the Pacific Fruit Express Company and the Southern Pacific Company, which appellant contends constitutes sufficient control by appellee, Southern Pacific Company, over the employees of Pacific Fruit Express Company to constitute the Pacific Fruit Express Company its agent. The appellant being an employee of Pacific Fruit Express Company, an agent of the Southern Pacific Company, thus likewise becomes an employee of Southern Pacific Company a common carrier by railroad.

2. The voluntary payments by the Pacific Fruit Express Company under the State Industrial Accident Commission of California is no bar to recovery under the Federal Employers' Liability Act, but such voluntary payments may be deducted against any judgment that might be obtained under the Federal Employers' Liability Act.

3. That appellee, Pacific Fruit Express Company, was at the time of the accident to appellant herein a common carrier by railroad under the provisions of the Federal Employers' Liability Act.

Dated October 14, 1948.

/s/ DANIEL V. RYAN,
/s/ THOS. C. RYAN,
Attorneys for Appellant and Plaintiff, Robert H. Gaulden.

(Acknowledgment of Service.)

[Endorsed]: Filed October 14, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above-entitled Court and to defendants and appellees, Southern Pacific Company, a corporation, Pacific Fruit Express Company, a corporation, and to Messrs. Dunne & Dunne, attorneys for said defendants:

You, and each of you, will please take notice

that appellant and plaintiff herein, Robert H. Gaulden, hereby makes the following designation of contents of record on appeal:

1. The complaint.
2. The answer.
3. The pre-trial written stipulation and order filed November 10, 1947.
4. The narrative statements by defendants in answer to interrogatories.
5. Copy of the Protective Service Contract between the Pacific Fruit Express Company, the Southern Pacific Company and the Union Pacific Railroad Company, dated July 1, 1942.
6. The opinion and order of the trial Judge, Honorable Louis E. Goodman, filed June 29, 1948
7. Judgment.
8. Notice of Appeal.
9. Statement of points relied upon by appellant and plaintiff on appeal.

Dated October 14, 1948.

/s/ DANIEL V. RYAN,
/s/ THOS. C. RYAN,
Attorneys for Appellant and Plaintiff, Robert H. Gaulden.

(Acknowledgment of Service.)

[Endorsed]: Filed October 14, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEES' COUNTER DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED

Appellees, Southern Pacific Company, a corporation, and Pacific Fruit Express Company, a corporation, do hereby make their counter designation of the portions of the record on appeal herein to be printed.

Appellant has heretofore designated certain portions of the record on appeal herein to be printed.

Appellees do hereby designate that the whole of the record on appeal be printed herein, except the following:

1. Demand for jury trial.
2. Interrogatories to defendants.
3. Objections to interrogatories, notice of hearing, etc.

3-a. Reporter's transcripts.

4. Notice of motion to compel reply.

Dated Oct. 29th, 1948.

/s/ ARTHUR B. DUNNE,
/s/ DUNNE & DUNNE,
Attorneys for Appellees.

(Acknowledgment of Service.)

[Endorsed]: Filed October 30, 1948. Paul P. O'Brien, Clerk.